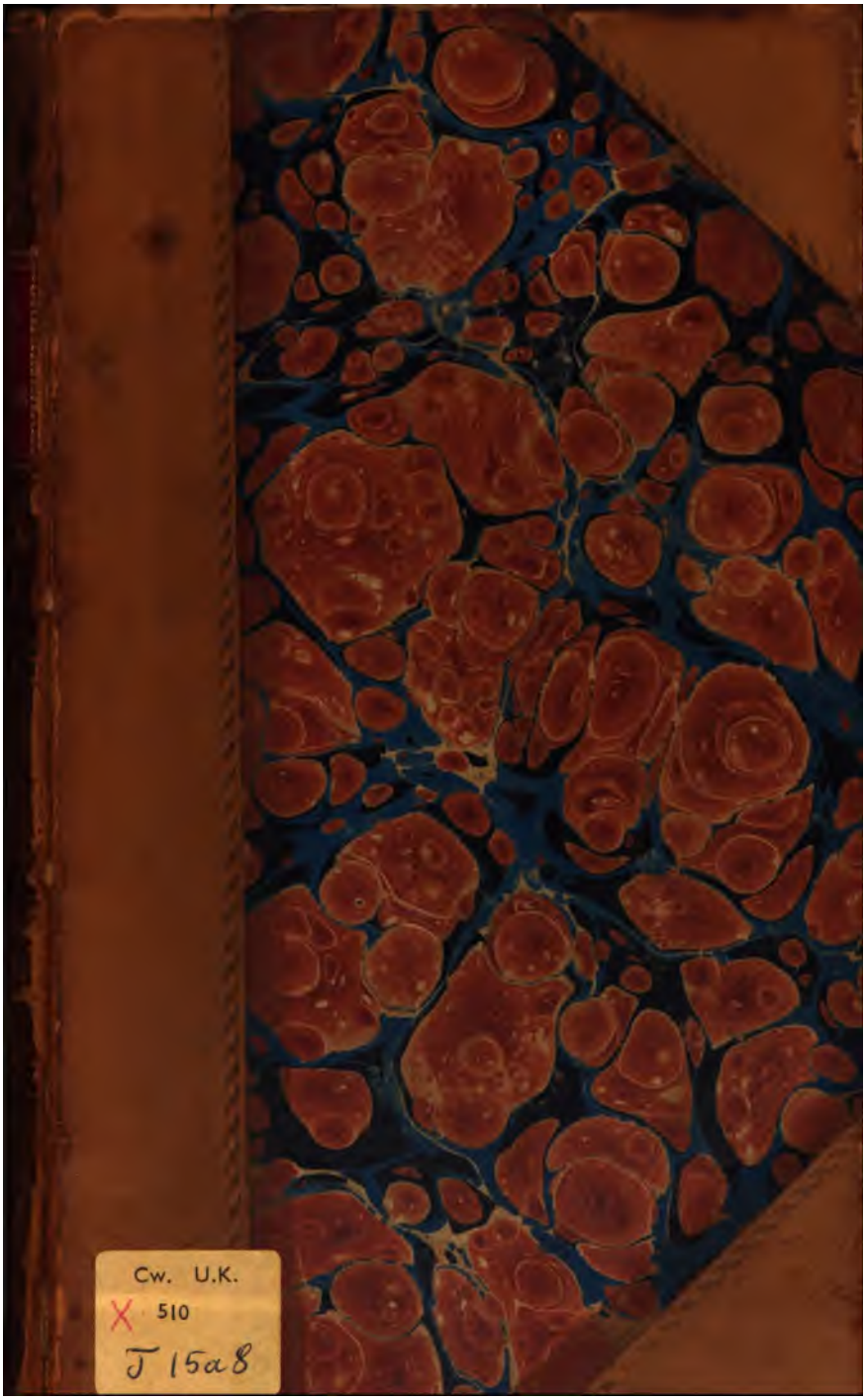


A

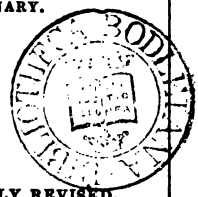
Law Grammar,

OR

RUDIMENTS OF THE LAW.

By GILES JACOB,

AUTHOR OF THE LAW DICTIONARY.



Eighth Edition,

GREATLY ENLARGED AND CAREFULLY REVISED,

BY

JOHN HARGRAVE, ESQ.

OF THE INNER TEMPLE.

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ADVERTISEMENT

TO

THE EIGHTH EDITION.

A WORK which has passed through seven large editions requires but few introductory remarks on the part of an editor, its utility being already sufficiently attested by the extent of its sale, and the still continuing demands of the profession.

Since the last edition was published, most important alterations have taken place as well in the criminal law as also in that relating to real property; this circumstance has rendered it necessary to introduce much new matter into the following pages, and to leave out such of the old statute law as has been repealed or altered; but in doing so the editor has carefully avoided an interference

with those branches of learning which being now altered by modern enactment still require to be understood by the student; such as the law relating to Fines and Recoveries.

Another alteration in the original text has also been made, and which it is believed will be of great utility, viz. the arrangement under proper chapters, of the various divisions of the law.

But although the present edition has been enlarged, and modern law and modern cases have been necessarily inserted, burthensome statements of legal doctrines have been avoided, elementary points have been adopted in their stead, and the technicalities of profound arguments left for other and distinct treatises; the object of the editor has been to prepare a correct epitome of the existing law, and in such a form as will most benefit the younger branches of the profession.

An experience of many years in the profession, enables the editor most fully to appreciate and

enter into the sentiments of a very eminent Conveyancer and commentator on the law of Real Property, when he says that "any work which is "calculated to abridge the labour of the student, "by bringing the points together under each head "into one view, and under an arrangement ena- "bling him to find that of which he is in search "with the least possible delay, is of more value "than can be conceived by any but those whose "practical experience has taught them its import- "ance."—*See Preston, Abst. of Tit.* vol. i. p. 215.

J. H.

TEMPLE, 1840.

PREFACE

TO

THE FIRST EDITION.

THE great oracle of the law, Sir Edward Coke, has observed, "that there is no learning so excellent for all sorts and degrees of people, as the knowledge of the common law of England; and though in the study of it, at the beginning it seems difficult, yet when a person dives to the depth thereof, it is greatly delightful; and he which reaches deepest sees the admirable secrets of our law."

The famous Chancellor Fortescue, in his learned treatise *De Laudibus Legum Angliæ*, likewise observes, "that the Latin words *jus* and *lex* intend the law under the consideration of a *science;* wherefore, he says, after you have made some progress in common *grammar*, it will be necessary and sufficient to use the same method and proportion in the study of the law: and as *etymology*, *orthography*, *prosody*, and *syntax*, are the springs and fountains of grammatical learning, so the *principles*,

causes, and *elements*, are the foundation of *learning in the law*."

On considering what has been so wisely observed by two such most learned, excellent, and worthy persons, I have very great encouragement; to which I add, that as among the liberal sciences the *art of grammar* has always the precedency, it being *janua omnium artium*, the portal by which we enter into the knowledge of all arts, and whereby we communicate ourselves and studies to others; it is from all these considerations that I have at length, though late, now attempted a *Grammar of the Law*, contained in the several distinct heads or chapters, of *Definitions, Grounds and Principles, Maxims and General Rules, Moot Points or Cases, Words of Art, and Terms*, &c.

Under this division of *Titles* is here comprised a *general knowledge* of *our whole law*, in a brief *epitome;* and the *best method* of instruction: and, I think, there is no room to question that in great *schools*, and particularly at *colleges* in the *universities*, before the diligent scholars leave those academies, some chosen *lessons* or *sentences* got by heart from this *Law Grammar*, and daily repeated with their other learning, would be a singular benefit and advantage to them; not only in their future *conversation* with others, but also in preserving their own *estates and fortunes*, and *lives and liberties*, and by keeping them *out of danger*, especially the greatest, that of offending the law.

To that good end and purpose, I have been fuller in treating of all the *crown laws* relating to *offences*, than on any other laws or statutes, being very sensible they most concern mankind in general, and preserve and establish the *peace* of the kingdom; without which provisions there are many persons in the world, who, like fierce and savage wolves, would prey upon and devour one another.

But in this extensive law branch, and indeed every where else, my discourse I have generally confined to *short periods*, having divided all long sentences, the more effectually to *impress* things on the *memory*, and there to retain them; and likewise to make the matter of the *greatest importance* appear the most *conspicuous* and *remarkable*, by separating it from the rest; which new method of handling our laws I think is in some sort *academical*.

Further, I have here inserted a great number of the choicest Latin *Maxims* of the law, beyond what otherwise I should have done, but with a design to please, as well as *instruct* all youth at our Universities, or Inns of court, and young gentlemen in their private education; also, sometimes, I have made small philosophical and other digressions, for their better improvement and entertainment.

On the whole, the following little tract is a quite new Essay, there being no treatise any ways like it

hitherto published, and therefore it is to be hoped it will be favourably received by every impartial reader, since I may truly assure them, it throughout contains very material and useful information.

"*Multum in parvo.*"

G. JACOB.

TABLE OF CONTENTS.

CHAPTER VI.

CHAPTER VII.

CHAPTER VIII.

A

LAW GRAMMAR.

CHAPTER I.

DEFINITIONS AND DIVISIONS OF LAWS.

LAW in general is defined to be a certain rule for the well-ordering of civil society;—it is an art directing mankind to the knowledge of justice, and the fountain of all those precepts by which man, the noblest of sublunary beings, is commanded to make use of the faculties of reason and free-will in the general regulation of his behaviour.

Lex est sanctio justa jubens honesta et prohibens contraria.—Bracton, c. 3, s. 1, f. 2.

And Laws are held to be either Natural, or Arbitrary.

The *Natural Laws*, are coeval with mankind, and are such as in themselves are just and good, and binding in all places, for they are every where the same, being from God himself. No human laws, if contrary to these, are of any validity.

Arbitrary or *Municipal* laws, are institutions made by men, founded on convenience, and depending on the authority of the legislative power that made them: they are designed for maintaining public order.

But all laws, according to Fortescue, derive their force *à lege naturæ*, from the law of nature; and the limited law of nature is the law now used in every state.—*Fortescue de Laud. Leg. Angl.* c. 16.

The Laws of England are divided into three classes.

First,—The *Common Law*, which is taken for the law of England simply, without any other law whatsoever, before any statute was enacted to alter the same: it is grounded on the general customs of the realm.

This law (says Lord Hale) is singularly adapted to the frame of our constitution.

It is that which maintains and provides for the safety of the king's person, his crown and dignity, and all his just rights and prerogatives.

And this law is also that which declares and asserts the rights, and liberties, and property of the subject.—*Hale's Hist. Com. Law*, c. 3.

Second,—The *Statute Law*, or statutes made by the king and both houses of parliament, which are usually passed for providing against new mischiefs and evils that arise by the corruption of the times.

Third,—*Particular Customs* in divers parts of the kingdom, used by the people, and found to be beneficial, and which being continued time out of mind, without interruption, have obtained the force of a law, to bind the places, persons, and things, concerned therein.—*Co. Litt.* 110; *Consuetudo pro lege servatur.*

And in order to ascertain whether particular cus-

toms are good according to law, the following requisites appear to form the necessary component parts of each; viz.—It must have been used so long that the memory of man runneth not to the contrary;—it must have been continued, and without any interruption;—it must have been peaceable, and not subject to dispute;—it must not be unreasonable in itself; it must be certain in its objects and effects; it must, although established by consent, be compulsory, and not left to the option of every one whether he will adopt it or not;—and lastly, customs must be consistent with each other, because one custom cannot be set up in opposition to another.

Our laws, however, have a larger particular classification, and are again subdivided under the following heads, viz.

The *Crown Law*, concerning the king and his prerogative.

The *Law* and *Custom* of *Parliament*, to determine matters there done.

And by Holt, C. J., this law ought to be determined in the King's Bench, where any question arises thereon. —*R. Raymond*, 18.

The *Common Law*, that is common to the whole kingdom.

The *Statute Law*, enacted in parliament.

Reasonable Customs, established by long usage.

The *Law of Arms*, relating to war and martial affairs.

But what is called the *Martial Law*, may not be exercised on persons in time of peace, when the king's courts are open for justice; except it be by authority

of parliament, as is of late times done by annual acts for the punishment of mutiny and desertion in the army.

The *Ecclesiastical* or *Canon Law*, which signifies the law of the church, and consists of certain rules taken out of the Scripture, the writings of the Fathers, the ordinances of General Councils, and decrees of Popes in former ages.

The general canon law, is no farther in force in this kingdom, than it has been received here, and is consistent either with our common or statute law.

Though we have particular canons made in the convocation, and having the king's royal assent, for the government of the church, religion and clergy, &c.

Which are warranted by act of parliament, and deemed the laws of the land.—*Can. Jac.* 1.

The *Civil Law* used in certain cases, and is that law which every particular nation or commonwealth has peculiarly established for itself.—*Jus Civile est quod quisque Populus sibi constituit.*

In a stricter sense, it denotes that law which the old Romans made use of, and was compiled from the laws of nature and nations; the twelve tables may be said to be the foundation of it, which are highly esteemed for their great equity.

This law is allowed here in the two universities of *Oxford* and *Cambridge*, for training up students, &c.; also in matters of foreign treaties, marine affairs, ordering martial causes, judgments of ensigns and arms, rights of honour, &c.

The *Forest Law*, for preserving the king's game.

The *Law of Marque and Reprisal*, to redress people injured at sea.

And the *Law-Merchant*, proper to merchants, and

differing from the common law, but become a part of the laws of the realm.

In ancient authors, the several grounds of the law of England are said to be these:

First,—The *Law of Reason*, which is observed in this realm as in all others; and reason is the gift of God to man, or power of the soul that discerns between good and evil, comparing the one with the other, and which shows virtues, loves good, and flies vice; from whence it is termed the first rule, that all things must be ruled by.

Secondly,—The *Law of God;* and therefore it was formerly inquired in divers courts, if any persons held opinions secretly or otherwise against the true Catholic faith; or if any general custom were contrary to the law of God, or any statute was made directly against it.

Thirdly,—The *General Customs*, from time immemorial, used throughout all the land, which have been ever approved by the king and all his subjects, as being neither against the law of God nor the law of reason; and which are properly called the common law.

Fourthly,—The *Law Maxims*, consisting of divers principles that have always been taken for law in this realm; and what is a maxim or general custom, and what is not, shall be determined by the judges.

Fifthly,—The *Particular Customs* used in several counties, towns, cities and lordships of the realm; and these, because they are not contrary to the law of reason, nor the law of God, though against the general customs or maxim of our laws, yet they stand in effect for law.

Sixthly,—The *Statutes* enacted by our lady the queen,

and by the lords spiritual and temporal, and the commons, in divers parliaments, in such cases where the law of reason, the law of God, customs, maxims, and other rules of law, have not been sufficient to punish evil men, and reward the good.

And these statutes are either public or private. A public act of parliament affects the whole community. And private or special acts of parliament are those which operate upon particular persons or private concerns. But all acts of parliament relating to the king or queen are general and public acts.

There are no other grounds of the laws of England; and according to Lord Coke, the Common Law, is the common birth-right that the subject hath for safeguard and defence of his liberties and properties, viz. not only of his goods, lands, and revenues, but also of his wife and children, body, fame, and life.—*Co. Lit.* 142.

On the foundation of our laws, and from natural principles of justice, every person is entitled to his life, liberty and property, who has done no act to forfeit either.

The right of personal security, which the laws of England afford, are not only confined to a man's life, his limbs, or his body, but his health and his reputation are alike protected. Next to these, the law regards, asserts, and preserves the personal liberty of individuals; and every Englishman may claim a right to remain in his own country unless driven from it by sentence of law; except indeed sailors and soldiers, whose employments necessarily imply an exception. The remaining absolute right inherent in every subject of this realm is that of property, which consists in the free use and enjoyment of all his lawful possessions.

By Magna Charta it is declared, that no freeman shall be divested or deprived of his freehold or his liberties, except by the judgment of his peers, or the law of the land.

A person's life may be unlawfully taken away in divers ways; as in cases of murder, manslaughter, poisoning, &c.

A man's liberty may be affected in several manners, as by false arrest and wrong imprisonment, &c.

And a person's property may be trespassed upon and injured by force, or lost, by taking away his goods, committing felony, robbery, or burglary.

But in each of the above instances the law is always ready to award a just punishment to the evil-doer according to the extent of his crime; and in cases of civil injuries, a quantum of damages in proportion to the specific injury sustained.

CHAPTER II.

MAXIMS AND GENERAL RULES FOR INTERPRETATION OF THE LAW.

A *Maxim* in law is said to be a proposition, by all men to be confessed and granted, without any proof, argument, or discourse. *Contra negantem principia non est disputandum.*

Maxims are some of the grounds of the law of England, and are of the same weight in law as the statutes, and the general customs of the realm are their strength and warrant.

What is a maxim in law, and what is not, shall be determined by the judges, and not by a jury.

Of maxims and general rules the books of law are full; but the chief of the *Latin Maxims*, affecting life, liberty, or property, with useful observations thereon, are these which follow.

Actus Dei nemini facit injuriam: the act of God does injury to no man.

The reason of our law is so much ruled by *religion*, that it will not permit the act of God to prejudice any; therefore if any house is blown down by tempest, the tenant is excused in waste; but if he expressly covenant to repair, then an action lies.—*Co. Lit. 53.*

If a defendant dies in execution for debt, the plain-

tiff in the action shall have a new writ of execution, because the defendant's death is the act of God.

For otherwise the plaintiff would lose his debt without any default in him.

Actus legis nulli facit injuriam: the act of the law doth injury to none.

For if lands out of which a rent-charge was granted were recovered by elder title, and thereby the rent-charge became avoided; yet the grantee might have had a writ of annuity.—*Dy.* 60.

And this because the rent-charge was made void by course of law.

Actus me invito factus, non est meus actus: an act done against my will is not my act.

As where a person is compelled, for fear of imprisonment, to make a bond, deed, or other writing; the compulsion will render the same void, as if it had never been made.—*Co. Lit.* 253.

And not only a deed, but a marriage procured by duress, is likewise voidable; for all acts ought to be voluntary, and the law hath a special regard to the safety and liberty of persons.

If one obliges another to surrender his estate, it amounts to a disseisin of him.—14 *As.* pl. 10.

Actio personalis moritur cum personâ: a personal action dies with the person.

In case one commits a trespass, or a battery be done to a man, and he that did it, or the other die, the action is gone.—*Noy's Max.* 5.

A lessee for years makes destruction on the lands

let, and then dies, no action of *waste* will lie against his executor or administrator for waste done before their time.

Also an action of debt lies not against executors upon a simple contract, for that action dies with him.

And because the executors cannot wage their law or deny it, as the testator might have done.—9 *Co.* 87.

Yet there may be an action of *assumpsit* upon the implied promise of the testator.

Accessorium non ducit sed sequitur suum principale. Therefore on a grant of land for life, rendering a certain rent, with the reversion to another, the rent passes with the grant of the reversion, because it is incident to it; but the reversion would not pass by a grant of the rent.—*Co. Lit.* 152.

So if land to which common was appendant or appurtenant was recovered in an assise of novel disseisin, it was a tacit recovery of the common also.—*Co. Lit.* 154.

So also where the tenant in tail of a manor to which an advowson is appendant, makes a feoffment of the manor with the appurtenances, and the feoffee re-infeoffs the tenant in tail, saving to himself the advowson on the death of the tenant in tail, his issue being remitted to the manor, is consequently remitted to the advowson also, notwithstanding its severance; for the manor is the principal to which the advowson is accessary.—*Co. Lit.* 349 b.

And under the old law, in criminal matters, if a servant instigated a stranger to kill his master, this being murder in the stranger as principal, of course the servant was accessary only to the crime of murder; though had he been present aiding and assisting, he would have been guilty as principal in petty treason, and the stranger

of murder; for it is a maxim that *accessorius sequitur naturam sui principalis*: and therefore the accessory cannot be guilty of a higher crime than the principal. —3 *Inst.* 139; 2 *Hawk. P. C.* 443; *Dyer*, 128, 254; 4 *Bl. Com.* 36. See also *Wingates's Maxims.*

Accusare nemo se debet nisi coram Deo: no man ought to accuse himself unless it be before God.

An oath is not lawful whereby any person may be compelled to confess, or accuse himself, &c. Likewise a person may not swear for himself, but only where he has particular power by some statute.—4 *Co.* 9.

In all cases of confession of crime before magistrates and other persons, if it appears that a prisoner was induced to do so either by promise of reward, or by menaces or undue terror, it cannot be received in evidence against him.—2 *Hale*, 285.

The law will not enforce any one to show or say what is against him; for which reason an offender, though ever so culpable, may plead Not Guilty; and is mostly recommended to do so by the judges of assise.

Aliquis non debet esse judex in propriâ causâ: no person ought to be a judge in his own cause.

And therefore a lord of a manor having cognizance of all kinds of pleas, cannot hold plea to what he himself is a party; nor may justices of peace act in any matter relating to themselves; except in certain parish business.—16 *Geo.* 2, c. 18.

But an innkeper in his own case may detain a guest's horse until satisfaction be made for standing and other charges: and a person may retake his own goods of which he is dispossessed, or a person having a lien may detain goods until his demand is satisfied, &c.

One cannot generally be witness in his own cause; for it is presumed by the law that he will be partial in speaking for his advantage.—*Co. Lit.* 6. But this rule however does not extend to criminal cases.

Ambiguum pactum contra venditorem interpretandum est: an ambiguous deed or contract is to be expounded against the seller or grantor.

So that if a man having a warren in his lands grants the same land for life, without mentioning the warren, yet the grantee shall have it with the land.

For otherwise the grantor should have excepted such warren out of the deed or grant.

But words shall be taken in the most favourable sense of the speaker; as in an action against a man for saying of the plaintiff that he hath forsworn himself, it may be construed to be in common conversation.

And the action is only maintainable where it is said he hath forsworn himself in a court of record.—4 *Co.* 13.

A verbis legis non est recedendum: we ought not to go from the words of the law.

The judges may not make any interpretation of a statute against the express words thereof; for nothing can so well declare the intent of the makers of an act of parliament, as their direct words in it themselves.—5 *Co.* 118.

All acts of parliament and letters patent must be construed one part with another, and all the parts of them together; and the words are to be taken in a lawful and rightful sense, and applied to the advancement of the remedy, &c.—*Co. Lit.* 381.

Where a statute admits of two rules of construction,

the intent of the legislature must be regarded in its interpretation.—*Major* v. *Oxenham*, 5 *Taunt.* 340.

So also with doubtful words, the spirit and intention of the particular act containing them is to be taken into consideration by the judges.—*Jardine* v. *Lewis*, 9 *B. & C.* 548.

Statutes *in pari materiâ* are to be construed in relation the one to the other; and where a subsequent statute declares the meaning of a preceding one, it will govern the construction of the first.—*Morris* v. *Mellen*, 6 *B. & C.* 454.

All penal statutes should always receive a liberal and not merely a literal construction; and no statute should be so construed as to work injustice.—*Needham's case*, 8 *Rep.* 136 a.

But cases out of the letter of a statute, yet being within the same mischief, shall be within the remedy the statute provides.

Bastardus nullius est filius; aut filius populi: a bastard is the son of none, or the son of the people.

As a bastard is born out of marriage, his father is not known by the law; therefore he shall not inherit or be heir to any person, for that he is in law as no man's issue; and he can have no heir but of his own body; because of the uncertainty who is related to him.—*Co. Lit.* 243.

The bastard of a woman is said to be no child, where the mother gives lands to him as such; but having by time gained a name of reputation, he may take a remainder, as a reputed son; and may himself purchase by his reputed name, &c.—*Dyer*, 374.

In case a child is born only a day after marriage, between parties of full age, it is no bastard, but supposed

to be the husband's: so if a man takes a wife, big with child by another, who was not her husband.—*Rol. Abr.* 358.

And if the husband be within the four seas, so that by intendment of law he may converse with his wife, and she hath issue, the child cannot be proved a bastard.

These cases are, unless there be an apparent impossibility, that the husband should be the father of it; as if he has lost his genitals, &c.—*Co. Lit.* 244.

Caveat emptor; qui ignorare non debuit quod jus alienum emit: let a purchaser take care what he does, for he ought not to be ignorant of what he is about who buys the right of another.

In most cases of defects in the quality of estates this rule applies; and thus, although there be defects in the estate, yet if they are patent, the courts of equity will afford no relief.—*Lowndes* v. *Lane*, 2 Cox, 363.

It was said by Lord Rosslyn in *Oldfield* v. *Round*, 5 Ves. 508, that he could not help a purchaser, who did not choose to inquire for himself.

False descriptions of property, where the purchaser has the power and opportunity of judging for himself, do not entitle a purchaser to relief.—*Scott* v. *Hanson*, 1 Sim. 13.

Caveat actor: let the actor take care what he does.

If a landlord gives an acquittance to his tenant for the last rent due, all rent in arrear is presumed to be satisfied.

And in case a person bound by bond pays a lesser sum before the day appointed, or at another place than is limited, and the obligee or lender of the money then

and there receiveth it, this is a good satisfaction.—*Co. Lit.* 212.

Acceptance of rent affirms, and makes a voidable lease to have continuance; and if where a tenant or lessee assigns over his term, the landlord accepts the rent of the assignee, knowing of the assignment, he cannot afterwards sue the lessee for rent.—3 *Co.* 23, 64.

An executor paying debts on simple contract, before those of a higher nature on judgments, &c., is liable to the payment of all.—*Pl. Com.* 543.

And taking any of the goods of the deceased, makes a man executor in his own wrong, and answerable.

Causa et origo est materia negotii: the cause and beginning is the matter of the business.

Although the law gives power to a person to enter a tavern;—the lord to distrain his tenants' beasts;—him in reversion to view if waste be done;—a commoner to enter into the land to see his cattle, &c.

Yet if he that enters the tavern commits a trespass, or the lord that distrains for rent, &c. kills the distress, or if he who enters to view waste breaks the house, or the commissioner cut down trees; in these and the like cases, the law will judge that they enter for that purpose, and they shall be trespassers from the beginning. —8 *Co.* 146.

Cessante causâ, cessat effectus: the cause ceasing, the effect also ceaseth.

Where a woman married is divorced from her husband, she shall have her goods given in marriage, not being spent; for they were given in advancement of the woman, and the cause and consideration of that gift is defeated.—*Dyer*, 13, 61.

In an action where a debt is the cause of execution, on lands or goods, if the plainliff releases to the defendant all debts, the discharge of the debt discharges the execution which is the effect of that cause.

If an office be granted to a person, to perform certain business, and he fails in his duty, the office shall cease and determine.

Conjunctio maris fœminæ est de jure naturæ: the conjunction of male and female is of the law of nature.

The bodies and minds of persons are both joined in matrimony; in contracting which, the consent of the mind is chiefly regarded: wherefore it is said, that the parties' consent, and not the copulation, makes the marriage.—*Co. Lit.* 33.

All persons may lawfully marry, who are not near of kin, and prohibited by the Levitical degrees; and the age of consenting thereto is fourteen years in the man, and twelve in the woman: if they marry before those ages, they may themselves disagree to it.

A husband and wife are accounted in law but as one person: and by marriage the man is entitled to all his wife's real and personal estate; as the husband is the woman's head, all she hath is her husband's; but then he is liable to the payment of her debts. A man cannot grant any thing to his wife, or enter into any covenant with her, for the grant would be to suppose her separate existence, and the covenant would be a covenant with himself.

A husband is bound to provide his wife with necessaries, and if she is obliged to contract debts for them, he is obliged to pay for them; but it must appear that they are actual necessaries.

An action of debt lies against the husband for goods

sold to the wife; the law presumes they come to his use: but a wife may not make any contract without the husband's consent, except it be for necessary things for her family, &c.; if she do otherwise, it will not be binding upon him.

The wife is *sub potestate viri*, and therefore her acts with regard to sale of lands and real estates shall not bind herself, unless she acknowledges a fine of the lands, &c.

In the trial of any cause, the wife is not allowed to be evidence for or against her husband, and *vice versâ;* partly because it is impossible that their testimony should be indifferent, but principally because of the union of person.

But not so in criminal cases, where the husband has inflicted an injury upon the wife.

Consuetudo manerii et loci est observanda: the custom of the manor and place is to be observed.

It is the customs of a manor which must direct what a copyholder ought to do, or ought not to do; but copyhold estates shall not have the collateral qualities that estates of the common law have, without a special custom.—*Co. Lit.* 63.

According to the general custom, if a copyholder commit waste, either permissive or voluntary; or do not pay his rent to the lord, being demanded, on the land; or if he refuse to do suit of court;

Or in case he makes a lease of his estate for a longer time than a year, without licence from the lord, &c., either of these will be forfeitures of copyhold estates.

Concessus tollit errorem. Therefore in a writ of right, if the jury who were to try the mere right were once

impanneled by the four knights, with the consent of both parties, none of the twelve so chosen could be afterwards challenged.—*Co. Lit.* 37 a, 294; 5 *Co.* 40 b.

So if an issue be tried by another jury than it ought to be, the verdict cannot be set aside as for a mis-trial, if the venue was changed by the consent of the parties. —*Cro. Eliz.* 664; *Co. Lit.* 126 a; Mr. *Hargrave's* edit. note (1); 5 *Co.* 36 b.

Cujus est solum, ejus est usque ad cœlum. Land, in its legal signification, is of an infinite extent upwards as well as downwards; and this is the maxim of law *upwards;* and therefore no man may erect a building to overhang another's ground; and *downwards,* whatever is in a direct line between the surface of the land and the centre of the earth belongs to the owner of the surface, as is every day's experience in the mining countries.—2 *Bl. Com.* 18; 1 *Term Rep.* 704; *Cro. Eliz.* 118; 9 *Co.* 54; *Co. Lit.* 166; *Wood's Inst.* 254.

Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest; to whomsoever any one shall grant any thing, he grants that without which it cannot be.

If lands are granted to a man, he has an implied covenant for peaceable enjoying the same, and the law allows him a way thereto without being expressly mentioned.—*Co. Lit.* 56.

And where a person grants all the timber trees growing in his woods, the grantee may come upon the ground, and cut them down, and carry them through all his land, though the grass receive injury by the carriage: for trees are proper to be carried by carts,

and when a man hath title to the principal thing, he shall always justify the necessary circumstance.—*Pl. Com.* 15.

A tenant at will sowing corn on the ground, if he be ousted by the lessor, shall have free entry (egress and regress), for cutting and carrying away the same.

And in case he be disturbed therein, he may bring an action and recover damages.

Cui licit quod majus, non debet quod minus est non licere: to whom it is lawful to do the greater, to him it is not unlawful to do the lesser thing.

Where there is a custom that lands may be granted to any one in fee simple; here the grant to a person and the heirs of his body, or for life, is within that custom.

A person who has an office to him and his heirs may make an assignee, and consequently a deputy.

Dilationes in lege sunt odiosæ: delays are odious in the law.

The delaying of justice is an obstruction to and a kind of denial of it; and pleas that are dilatory shall not be received, unless sufficient probable matter is shown for it, or the truth of them be proved by affidavit.

If a plaintiff forbears to bring his cause to trial, the defendant is not to be delayed, but may take out a writ of *venire facias*, directed to the jury to try the cause, by what is termed *proviso*.

If the plaintiff do not proceed to trial in a convenient time, he shall be nonsuit.—14 *G.* 2, *c.* 17.

In criminal cases, where persons are committed to

prison for capital offences, as treason, felony, &c. expressed in the warrant, on prayer in open court, the first week of the term, or day of sessions, they are to be brought to trial.

If they are not indicted the next term or assizes, upon motion made the last day of such term or assize, they shall be admitted to bail, unless the king's witnesses are not ready.

And in case they are not tried the second term or assize, they may be discharged.—31 *Car.* 2, *c.* 2.

Dormit aliquando jus, moritur numquam: a right sometimes sleeps, but never dies.

In the eye of our law, right is of such an high estimation, that the law preserves it from death and destruction; for though trodden down it may be, it is never trod out.—*Co. Lit.* 279.

A right to land, it is held, cannot die; indeed a release of a person's right enures by way of extinguishment, but then it is so understood in respect of him that makes the release, &c.

De minimis non curat lex: the law cares not about trifles.

Therefore, where an action of waste is given, if the waste done be only of the value of two-pence, the plaintiff shall not have judgment.—*Plowd.* 29. And it is said that the waste ought to be to the value of forty-pence at least.—*Hargrave's Co. Lit.* note (10), p. 54 a.

Dominium a possessione cœpisse dicitur: right and dominion is said to have its beginning from possession.

According to this maxim, a long and quiet possession of a right sufficiently establishes such a right; but

then it must exceed the memory of man; and if there be proof of record, or in writing to the contrary, though it exceeds the knowledge or memory of any one living, yet it is judged within memory.—*Co. Lit.* 115.

The reason why a peaceable possession, without contradiction, makes a right in law, is that thereby there may be certainty of titles to estates.

The limitation of time as now fixed for the recovery of lands is regulated by the 3 & 4 Will. 4, c. 27; and by the second section of that act no land or rent can be recovered but within twenty years after the right of action has accrued to the claimant, or some person whose estate he claims.

Expedit reipublicæ ut sit finis litium: it is for public good that there should be an end of litigation.

Therefore, where a suitor is barred in any action, real or personal, by judgment upon demurrer, confession, or verdict, he is barred as to that or the like action of the same nature for the same thing for ever.—*Ferrer's Case*, 6 *Co.* 7.

Expressum facit cessare tacitum: a matter expressed causes that to cease, which by intendment of law was implied and not expressed.

A man makes a lease, rendering rent, and the words of reservation are express to the lessor only, the heir shall not have it; but if no person be said to whom the rent shall be paid, this by implication shall be to the lessor and his heirs.—*Dyer*, 45.

An express covenant qualifies the generality of a covenant in law, and restrains it by the assent of the

parties, so that it shall extend no farther than it is expressed in the covenant.

But a warranty in law is not destroyed by an express warranty; as if one grants a lease, reserving a certain rent, in which he binds himself and his heirs to warranty of the land, &c.

There the warranty expressed shall not make that in law cease, or be of no effect, but the lessee may choose which he pleases.—4 *Co.* 81.

Ex nudo pacto non oritur actio: no action arises on a naked contract.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man, however he may be bound in honour or conscience, cannot be compelled by law to perform it.—*Dr.* and *St. D. 2, c. 24*; *2 Bl. Com.* 445; *Salk.* 129; *3 Burr.* 1670.

As if one man promises to give another 100*l.*; here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other.—*2 Bl. Com.* 445.

And it is a general rule, that wherever a person promises, without a benefit arising to the promissor, or a loss to the promissee, it is void, *2 Bulst.* 269; 1 *Bac. Abr.* 170, as being without a legal consideration. But as all promises shall be taken most strong against the promissor, the law will endeavour to find a good consideration, if possible, in order to support a fair contract, *Poph.* 148; *2 Roll. Rep.* 104; and therefore any degree of reciprocity will prevent the *pact* from being

nude; nay, even if the thing be founded on a prior moral obligation, it is no longer *nudum pactum;* as a promise to pay a just debt, though barred by the statute of limitations, *2 Bl. Com.* 445; or, a promise by a bankrupt after the bankruptcy, to pay a debt due before, in consideration of the creditor agreeing to take no dividend, *Trueman* v. *Fenton, Cowp.* 548; and as this maxim was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, *Plowd,* 308; 3 *Burr.* 1671, it does not apply where the promise is authentically proved by written documents; *sed vide* Lord *Mansfield's Opinion,* 3 *Burr.* 1671; and, therefore, if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration in order to evade the payment; for every bond, from the solemnity of the instrument, *Hardr.* 200; 1 *Ch. Rep.* 157, and every note, from the subscription of the drawer, *Ld. Raym.* 760, carries with it internal evidence of a good consideration: and courts of justice will therefore support them both as against the contractor himself; but not to the prejudice of creditors or strangers to the contract. —*2 Bl. Com.* 446; *Noy's Max.* 24; 8 *Co.* 80.

Expressio unius est exclusio alterius: the mention of one person is the exclusion of another.

Therefore, says Littleton, if the condition upon a mortgage be, to pay to the mortgagee, or his heirs, the money, and before the day of payment the mortgagee dies, the feoffor cannot pay the money to *the executors,* for the payment ought to be to *the heir;* and the law, adds Lord Coke, shall never seek out a person when the

parties themselves have appointed one; for *expressum facit cessare tacitum.*—*Co. Litt.* 210.

So, also, where a man was bound to pay 20*l.* to such a person as the obligee should by his will appoint, and the obligee named a person executor, but made no other appointment, it was resolved, that the executor should not have the 20*l.*—Lord *Nottingham's* MS. notes to *Co. Litt.* 210 a; sed vide 1 *Freem.* 476; 2 *Co.* 46; 1 *Bl. Com.* 88.

So, also, where a statute treating of "deans, prebendaries, parsons, vicars," and others having spiritual promotion; *deans* being the highest persons named, *bishops*, who are of still a higher order, are not included under the general words.

Fortior et potentior est dispositio legis quam hominis: the disposition of the law is of greater force than the disposition of man: this is explained in surrenders of estates.

As if a person having granted a lease of lands for years, to begin at Lady-day next, he cannot make a surrender of his future interest, because there is no reversion wherein it may be drowned.

Though in case the lessee before Lady-day take a new lease of the same lands, &c. for years. either to to begin presently or at Lady-day, this is a *surrender in law* of the former lease and interest.—10 *Co.* 67.

Furiosus solo furore punitur: a madman or lunatic is punished by his madness.

If a madman kill another, he hath not broken the , although he hath broken words of it; because he l not any memory or understanding, but mere igno-

rance, which comes from the hand of God.—*Plowden, Com.* 19.

And therefore such madman has favour shown him by reason of his disability;—he shall not suffer for any felonious act;—nor can the punishment of a lunatic without his mind and discretion, be an example to others.—*Co. Lit.* 247.

A madman, in a civil case, cannot promise or contract for any thing, or do any business; and this is because he understands not what he does; all his acts may be avoided, either by the king who has the care of the estates of lunatics, or by his heirs.

If a lunatic entered into the contract and bond of marriage, such marriage would be void if the lunatic enjoyed no lucid interval at the time of the celebration. —Parker *v.* Parker, 2 *Lee, Rep.* 382.

But if a man *non compos mentis* levied a fine, or suffered a recovery of lands, &c.—these, being matters of record, were held to bind himself and his heirs.—4 *Co.* 124.

The method of proving a person *non compos* is as follows:—The Lord Chancellor, to whom, by special authority from the crown, the care of all lunatics and idiots belong, upon petition or information made to him, grants a commission *de lunatico inquirendo*, to inquire into the party's state of mind; a jury is impanneled thereupon, and the commissioners named proceed with the inquiry by the testimony of witnesses; and if it be found that the party is *non compos*, the Lord Chancellor usually commits the care of the lunatic's person to some friend, with a suitable allowance for his maintenance, and the friend so appointed is called the "committee."

The next heir is seldom appointed as committee of the person of a lunatic, because it is his interest that the party should die, but is sometimes appointed committee of the estate, because it is his interest to keep it in good condition.

Hæres legitimus est quem nuptiæ demonstrant; he is lawful heir whom marriage demonstrates so to be.

A child born within marriage, though ever so soon after, is in law legitimate, and heir to the husband: but an alien may not be heir, though born in lawful wedlock.

In case a child be born in second marriage, within nine months after the first husband's death, he may be heir either to the first or second husband.—*Bract.* 91.

A bastard is excluded from being heir; and a monster without human shape, cannot be heir to a person; but an hermaphrodite, if there be any such, may take lands, &c. as heir according to that sex which is most prevalent.—*Co. Lit.* 8.

The eldest son, after the death of his father, is his heir; and if there be grandfather, father and son, and the father dies before the grandfather, the grandson shall be heir; who is termed *hæres jure representationis*, because he represents his father's person.

Till the death of the ancestor, one is called heir apparent; and, by the common law, a person cannot be heir to goods and chattels.

There is an *ultimus hæres*, on the escheat of lands for want of lawful heirs; which is the lord of whom held; and he is sometimes the king and sometimes the lord of the manor.

Id certum est, quod certum reddi potest. Therefore, where a tenant holds his land by shearing all the lord's sheep on a particular manor, if the service be referred to the number of sheep it would be *uncertain*, for there may be sometimes a greater and sometimes a less number, and in such a case the tenant would not be distrainable; it being a maxim that no distress can be taken for a service that is not certain; but if the service be referred to the manor, it then becomes certain.

A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate is good, though the value of the thing is uncertain; for the value may at any time be ascertained.

Ignorantia juris non excusat; the ignorance of the law doth not excuse one.

Ignorance of the law, even in infants being of the years of discretion, shall be no excuse if they commit crimes; and although it be invincible, as where a person affirms that he has done all that in him lies to know the law.—*Doct. & Stud.* c. 46.

For every man is bound at his peril to take notice of what the law of the realm is.

If any person takes upon him to know the law, and through ignorance openly affirms that a void lease, &c. is good, to the prejudice of another's title; he may have an action against him, and recover damages.

Ignorantia facti excusat; ignorance of the fact excuseth.

A person buys a horse in a fair or market of one that hath no property in him; if this were unknown to the buyer, he has good right to the horse, and his ignorance shall excuse him.

But here, if he had known the seller had no right, the buying in open market would not have excused.

Where an illiterate ignorant man seals a deed, and it is read to him false, that makes the same void.

Impotentia excusat legem; the law excuses impotency (or rather, natural inability).

This maxim regards the infirmities of persons, where the law excuseth their not doing certain acts; as of infants, men in prison, out of the realm, idiots, and lunatics, persons blind and dumb, &c.—*Co. Rep.* 177.

Legal imprisonment, without any covin, shall be a good excuse for a parson's non-residency, by reason of his impotency.

If a disseisee be an infant, feme covert, or in prison, &c. and the disseisor dies seised of the land, it shall be no descent to take away an entry, because of impotency in such persons.

And their right of action is saved, till their impediments are removed, where others are bound by the statutes of limitation.

Injuria illata in corpus non potest remitti: injuries to the body cannot be remitted or forgiven.

Our law carefully provides for punishing forcible injuries, between person and person, because they are most contrary to the repose of the kingdom, on which the public happiness depends.

And the life and member of every subject are under

the king's protection, to the intent they may serve him and their country when occasion requires.—*Co.* s. 161.

So tender is this part of our law, that if one do but menace another with a weapon or staff, or in case he stretch forth his arm, or give any other token, whereby his intention of striking appears; it is actionable as an assault, though no stroke be given.

In omnibus quidem, maximè tamen in jure, æquitas est: in all things, but especially in the law, there is equity.

The laws themselves desire to be ruled by equity; which is said to be a correction of the law, wherein it is any way wanting by reason of the generality of it.

The statute of Gloucester gives an action of waste against tenants for life or years; and by the equity of it, this action lies against him that holds land for one year only, or twenty weeks, &c. And if a lessor come upon the ground of the lessee, it shall be intended that he came to see whether waste were done.

For equity turns all to the best, and makes every act lawful, when it is indifferent if it be or not.—*Finch*, 57.

If a person does make a feoffment to a future use, the feoffee shall be seised of the lands, &c. to the use of the feoffee and his heirs in the mean time; and this is by equity.

In omnibus fere minori ætati succurritur; in all cases, generally, there is favour shown to persons within age.

No man or woman, before the age of twenty-one years, can alien or sell any lands, goods, or chattels, or bind themselves by deed, so careful is the law of their interest, unless it be for necessaries.—*Co. Lit.* 171.

An infant is permitted to do any thing for his own advantage, but not to his prejudice; he may make a purchase, which is intended for his benefit, though at his full age he may either agree to or waive it.

Infants may buy things, but cannot borrow money even to buy clothes; for the law will not trust them with money, but at the peril of the lender, who must see the same thus laid out.—*Salk.* 386, pl. 2.

A presentation to a benefice is to be made by an infant within the six months, being a thing of necessity, otherwise lapse shall incur against him; and he must perform a condition annexed to an estate by his ancestor, or shall be barred of the right to the lands.

In some cases also an infant is impleadable at law, and for his contempt shall receive the same punishment as a man of full age.—*Dy.* 104.

In pari delicto potior est conditio defendentis: therefore, where an assurance was made on goods on board a vessel "at and from London to New York," subsequent to the passing of the statute 16 *Geo.* 3, c. 5, which prohibited all commerce with the province of New York, and confiscates all ships and their cargoes which shall be found trading, or going to or coming from trading with the said province, and the ship being taken by an American privateer, the assured brought an action on the policy to recover the loss from the underwriter, but it being a direct contravention of the law, the maxim prevailed.

Jus sanguinis, quod in legitimis successionibus spectatur, ipso nativitatis tempore quæsitum est: the right of

blood, which is regarded in lawful successions or inheritances, is found in the very time of nativity.

It is therefore *jus primogenituræ*, or right of elder-brothership, which is principally respected, and it is a maxim, that the next of the worthiest blood shall ever inherit; as the male and all descendants from him, before the female; and the female, of the part of the father, before the male or female of the mother's part, &c.—*Co. Lit.* 14.

Among the males, the eldest brother, and his posterity, inherit lands in fee-simple before any younger brother.

Lex neminem cogit ad impossibilia: the law compelleth no man to impossibilities.

If the condition of a bond be possible at the time of making it, and before it can be performed becomes impossible by the act either of God, or the law, or of the obligee, &c. the obligation is not forfeited.

But where a condition for payment of money is made impossible in respect of time, as if it be to pay the same on the 30th of February, and there is no such day, it is due and payable presently.—*Co. Lit.* 206.

Where a man is bound by a recognizance or bond, with condition for his appearance the next term in such a court, and, before the day, the cognisor or obligor dies, the obligation will be saved; because it is impossible the condition should be performed.

So in case a lease be granted for twenty years, upon condition that the lessee dwells upon the lands the whole term, and he lives but ten years, the executors shall enjoy the lands, for the condition is become impossible.

A condition of a bond to go to Rome in a few hours, is void and impossible, but it is said the obligation may be good.

Legis constructio non facit injuriam: the construction of law shall wrong no person.

In case an executor of a will grants all his goods and chattels, the goods which he hath as executor shall not pass, for that would be a wrong to the testator's estate.

And where tenant in tail, or for life, makes a lease generally, it shall be taken for the life of the lessor or grantor, or else it would be wrongful to him in reversion.

Though if a person seized in fee make any lease for life, without mentioning for whose life, it shall be construed for the life of the lessee.

Lubricum linguæ non facile in pœnam est trahendum: the rashness of the tongue is not easily punished.

This is where words are spoken in a passion; for, in all cases, words of heat, as to call a man rogue, villain, knave, &c. will bear no action at law.—4 *Co.* 15.

But if one reproaches another with some heinous crime; calls a person, thief; a merchant, bankrupt; says of an attorney, he deals corruptly; or calls any one, a perjured man; an action of the case lies for damages, because these slanders are of great import, and concern a man's life, estate, and condition.

To call a person, bastard, who is heir to an estate; or to say, that a man has the French disease, &c., when he is courting a woman, are held actionable.

Mutatâ formâ prope interimitur substantia rei: the

form being changed, the substance of the thing is destroyed.

In case a person cuts down another's timber trees, and squares them to make beams for a house, he may seize the same before they are thus used. Though if they are laid in the building, they may not be seized by the owner, for their nature is then altered, and they are become part of the house; yet the party shall have his action for the damage.—*Dod.* 132, 133.

And where a man gets the barley of another, and makes it into malt, it cannot be taken again by the former owner, though its form is not lost; because it is become a thing of another nature and use.

Necessitas non habet legem: necessity hath no law.

Where a fire happens in the street of a town, any person may justify the pulling down the wall, or house of another, to prevent the spreading thereof, as it is a case of necessity.

And if several persons are in danger of drowning, by the casting away of a ship or boat, one to save his life may thrust another from a plank, or the boat's side, &c., though such other be thereby drowned.—*Bac. Max.* 25.

According to our ancient books, if a man stole victuals merely to satisfy his present hunger, it was neither felony nor larceny, being for the necessity of preserving life.

But this having necessarily encouraged thefts, it is now adjudged otherwise; and the privilege of necessity shall not prevail against the commonwealth.

The great Lord Coke says, *Necessitas est lex temporis.*

Necessitas inducit privilegium quod jure privata: necesssity gives a privilege denied by law; or as it is expressed in other words in 10 *Co.* 61, *necessitas facit licitum quod alias non est licitum:* necessity makes that lawful which otherwise is not so.

The law charges no man with default where the act which occasioned it was compulsory and not voluntary, or where there is not a consent or election.

And therefore if it is impossible for a man to do otherwise, or there is so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself.

Necessity is of three kinds, viz. for the preservation of life; from the obligation of obedience; and the act of God.

Nihil magis æquitati consentaneum est, quam ut iisdem modis res dissolvatur quibus constituitur: nothing is more agreeable to equity than that every thing should be dissolved by the same means it was first constituted.

Every contract and agreement must be released by a matter of as high a nature as that was; so that a deed in writing, under hand and seal, can only be released by some other writing, signed and sealed, &c.—*5 Co.* 26.

And therefore, an obligation or matter in writing, cannot be discharged by an agreement by word.

Where an estate is vested in the king by matter of record, it may not be divested out of him but by the like matter; and an act of parliament shall not be avoided but by parliament.

Nullus commodum capere potest de injuria sud propria: no man shall take advantage of his own wrong.

If a man be bound in a bond to appear at a day before justices, on which day the obligee casts him into prison, so as he cannot come; no benefit shall be had of this bond.—*Noy. Max.* 13.

In case a lessor and lessee of lands, for years, join in the cutting down of timber, the lessor shall not punish the lessee for such waste, and take advantage of his own wrong by joining therein.

An appeal of an infant may not stay for his full age, which would be taking advantage of his own wrong.

Nec tempus nec locus occurrit regi; neither time nor place affect the king.

In pursuance of the principle that the king is not only incapable of doing wrong, but even of thinking wrong, the law determines that in him can be no negligence or laches, and therefore no delay will bar his right. But this maxim is subject to various exceptions, both at common law and by statute. First, there are many cases in which the subject may make title against the king by *prescription*, as to treasure trove, waifs, estrays, and such other things as may be seized without matter of record.—*Co. Lit.* 114.

Secondly, in some cases the king's right necessarily fails for want of exertion in due time; either because the subject of his right determines before he claims it, or, because it is specially limited in point of time, by its creation.

Thirdly, sometimes lapse of time drives the king to a suit. Thus, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has recovered his presentment by due course of law.—13 *Rich.* 2, st. 1,

c. 1; *Staund. Præ.* 32; 2 *Inst.* 358; *Co. Lit.* 344; *Cro. Jac.* 385; 2 *Inst.* 188; *Hob.* 152, 347.

Fourthly, there were several statutes which wholly extinguished the king's title, if not exerted within a limited number of years. By 21 *Jac.* 1, c. 2, the king is disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued *sixty years* before the beginning of the then session of parliament, unless within that time there has been a possession under such title. But the efflux of time rendering the provision continually more effectual, the 9 *Geo.* 3, c. 16, introduced one of a permanent kind, by limiting the king to *sixty years* before the commencement of the suit or proceeding for recovery of the estate claimed.

The other part of this maxim is founded on the idea which the law entertains of the king's *ubiquity;* for he is supposed to be present in every place where his presence is necessary.

Nullum iniquum in jure præsumendum est: no injury is to be presumed in the law.

All things are taken to be lawfully done, till proof is made to the contrary; and fraud shall never be intended or presumed by the law, unless it be expressly averred.

Where no fraud is found by the jurors in a feoffment, the judges shall not adjudge the same fraudulent; and although jurors have found circumstances to intitle the finding of fraud, it is but evidence, and not any matter upon which the court may judge thereof.—10 *Co.*; *Ch. of Oxford*'s case.

For the office of the jurors is to adjudge upon the

evidence concerning matters of fact, and thereupon to give their verdict; and not leave things to the judgment of the court, which do not appear to them.

Omne actum ab agentis intentione est judicandum: every act is to be judged from the intention of the agent.

It is held in contracts and obligations, the intention of the parties is the chief thing that the law regards; and such words as show the assent of parties, and have substance in them, are sufficient.

The law will likewise take one word for another in deeds, to supply the intention of persons; as where a man has a remainder of lands, if he grants it to another, by the name of a reversion, the grant is good, notwithstanding the mis-terming of the thing.

In wills, the intent of the testator shall generally be observed, as far as is consistent with established rules.

Omne majus continet in se minus—the greater contains the less.

Therefore, if a man tender a greater sum of money than he is bound to pay, yet the tender is good; for, *quando plus fit quàm fieri debet videtur etiam illud fieri quod faciendum est: et in majore summâ continetur minor.*—8 *Co.* 585.

So also where a man is empowered to make *assigns*, he hath thereby an implied power to appoint *a deputy;* for, *cui licet quod majus est non debet quod minus non licere;* as where the office of steward is granted to a man and his heirs, he may make a deputy. Thus also a man in prison shall not be bound by a recovery by

default for want of answer in a court of record in a real action, which is matter of record; and *à multo fortiori* he shall not be bound by a descent *in pais*, which is matter of deed, and consequently of an inferior nature; for the argument, says Lord Coke, *à minore ad majus*, always holds affirmatively, and the argument *à majore ad minus*, negatively; the reason of which is, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.*

Omnia præsumuntur legitimè facta donec probetur in contrarium.—Co. Litt. 232, all things are presumed to be legitimately done until the contrary be proved.

Omnis interpretatio si fieri potest ita fienda est in instrumentis ut omnes contrarietates amoveantur; in instruments, if they will admit of it, such interpretation is to be given as will remove all contradictions.

Possessio fratris de feodo simplici facit sororem esse hæredem: the possession of the brother, of a fee-simple, makes the sister to be heir.

A man has issue, a son and a daughter by one woman or venter, and a son by another, then dies seised of lands in fee-simple, and the eldest son enters into the lands, after which he dies without having any issue. Here the sister shall have the land, and not the youngest son or brother, though he be heir to the father; but there must be an actual entry upon the land, otherwise it goes to the younger brother.—*Co. Lit.* 14.

The possession of a brother of an estate-tail, shall not make the sister heir; for it descends to the younger son of the half-blood, who ought to have it *per formam doni.—Pl. Com.* 57.

Prohibetur ne quis faciat in suo, quod nocere possit in alieno; et sic utere tuo ut alienum non lædas: it is forbidden that any one should do that in his own, which may injure another: and so use your own, that you do not hurt others.

Where a man does any thing upon his own ground, to the particular damage of his neighbour, it is accounted a nuisance; and an action lies for it, or the same may be abated or removed by the persons that are prejudiced thereby.

If a man has a house that has ancient lights, and a stranger having lands adjoining builds a new house on his lands, so near that the windows of the other are darkened by it; it is actionable.

As is also the setting up or making a house of office, dye-house, lime-pit, steam-engine, &c., so near to another's house, that the smell thereof annoys him, or is infectious; or if the corruption of the water of the pits hurts his water or grass, or destroys fish in a river, &c.

Proximus sum egomet mihi: every one is next to himself.

In case of wills, where an executor is appointed, he may pay himself a legacy, before any other; and among debts of equal degree, the executor may pay his own debt first.

Executors are nearer to the testator, and do more represent his person, than the heir does the ancestor; this is held, because if an executor be not named in a mortgage, yet the law appoints him to receive the money.

But the heir shall not receive it, unless he be named. —*Co. Lit.* 209.

Publicum bonum privato est preferendum: the public good is to be preferred before private interest.

A woman intitled to dower shall not be endowed of a castle of defence, for that is *pro bono publico;* but as to castles for private use and habitation, it is otherwise.

The inhabitants of a village may make by-laws for repairing a church or highway, or any such thing as is for the public good generally; and the greater part shall bind all of them, without custom.—5 *Co.* 63.

And corporations have power to make ordinances, for the government of their bodies politic, and better execution of the laws of the realm: but they may not do so, without a custom or charter, unless it be for things concerning the public good.

Quælibet concessio fortissimè contra donatorem interpretanda est: every man's grant shall be taken most strongly against himself.

Whenever a deed is uncertain, and the words of it are ambiguous, it shall be construed most strongly against the grantor therein; as if a man grants an annuity of land, and he hath no land at the time of the grant, it shall nevertheless charge his person.

And where any deed made to a person is good for part, and for some part thereof not good, that which is for the benefit and advantage of the grantee, shall stand good in law.—*Co. Lit.* 42.

But although grants are taken strongly against the makers, yet no wrong must be done by it; and a man may not be obliged by his own act and deed to do some things which are against law.

For if a husbandman be bound not to till or sow his

land, the obligation is contrary to the common law and void.—11 *Co.* 53.

Qui facit per alium facit per se; what one does by another, he does by himself.

If a man impowers another by letter of attorney to sell and alien his land, and he doth so, it is an alienation by him; and where a person gives authority to his bailiff to sell cattle, and he doth it, this will be his sale by the bailiff.—*Plowden's Com.* 475.

Where any person has a bailiff or servant, who is known to be such, and he sends him to markets to buy goods, his master shall be chargeable with the payment, if the things come to his use.

In case he sells his master's cloth, and warrants it to be good, or of a certain length, when it is not so, an action lies against the master only, and not the servant. —*Noy.*

And if a person commands one to do a trespass, or to beat another, he shall be himself a trespasser.

Qui sentit onus, sentire debet et commodum: he who bears the burden, ought also to receive the profit.

A man seized of lands in fee, hath issue a daughter and dies, his wife being with child of a son; the daughter enters and sows the lands, and then the son is born, and his next friend enters; here the daughter shall have the corn growing on the ground.—*Perkins.*

Also tenants for life, or in dower, having sown corn upon the land, may devise the same growing at the time of their deaths; and their devisees shall have it.

Qui sentit commodum, sentire debet et onus: he that reaps the profit ought to bear the burden.

If a person grant a rent-charge for life out of his land, and afterwards conveys the land to others, in every one of whose time the rent is behind, and then the grantee dies, his executor may bring action of debt against all of them for rent due in their time; as they all have the profit of the land.—4 *Co.* 49.

And on assignment of a lease, the lessee who hath covenanted to repair may have an action of covenant against his assignee, for suffering a house to decay; because he that enjoys the profit must bear the burden and charges.

Where persons enjoy benefit by making banks of a river, they are to contribute to the repairs thereof.—5 *Co.* 100; and so of party walls.

Quod initio vitiosum est, tractu temporis non convalescet: that which in the beginning is vicious, cannot by length of time be made good.

In case a bishop makes a lease of church lands for four lives, which is contrary to the statute, though one dies in his life-time, so as now there are but three, and afterwards the bishop dieth, yet it shall not bind his successor.

For here the lease so made had a bad and unlawful beginning, it being for more lives than the act allows, and therefore cannot be brought to a good end.—10 *Co.* 62.

If a feme covert, that is, a married woman, makes a will, and publishes the same, and afterwards dies, being sole, such will notwithstanding will be void and of no effect.

And this is because the foundation, viz. the making and publishing, is void.—*Plowden's Com.* 344.

Quod est inconveniens, et contra rationem, non est permissum in lege: whatever is inconvenient and contrary to reason is not permitted in the law.

It is likewise a maxim, that what is contrary to reason is unlawful: and hence it is said, that all positive laws, which are contrary to the laws of nature and of reason, are no laws at all.

Therefore if a town hath customs, which are against law and reason, and those customs are confirmed by act of parliament; such confirmation shall not make them to be good and binding.—*Co. Lit.* 110.

But no person ought, out of his own private opinion, to be wiser than the law.

Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum est: what otherwise is good and just, if it be acquired by force or fraud, is evil and unjust.

And if it be mixed therewith, it is the same thing: for where a man by will devised tenements to superstitious uses, and also to good and charitable uses; it was adjudged that the commixture of the evil use with the good infected the good use and destroyed it.—4 *Co.* 118.

At the common law, forcible entry into houses or lands, &c. was no crime where a person had title, and entry was lawful.

But by statute none shall enter into lands or tenements but in a peaceable manner, though they have title of entry; upon pain of imprisonment, &c.—15 *Rich.* 2, c. 2.

In this case justices of peace have authority to commit offenders till they pay a fine, and to restore the

possession; or an action of trespass may be brought, and treble costs recovered.—*2 Inst.* 257.

Res inter alios acta alteri nocere non debet. Thus, if a man make a lease for life, and then grant the reversion for life, and the lessee attorns; after which the lessor disseises the lessee for life, and makes a feoffment in fee, and the lessee re-enters; this shall leave a reversion in the grantee for life, and another reversion in the feoffee; and yet this is no attornment in law of the grantee for life, because he doth no act nor assent to any which might amount to an attornment in law, *et res inter alios acta alteri nocere non debet.*

Rex est vicarius et minister Dei in terra, omnis quidem sub eo, et ipse sub nullo nisi tantum sub Deo: the king is the minister of God upon earth; every one is under him, and he under none, but only God.—*Bracton. c.* 8.

All the lands in England are said to be holden either mediately or immediately of the king; and all estates for want of heirs, or by forfeiture, on committing crimes, escheat to the king, as lord paramount.—*Co. Lit.* 1.

Lands in the king's possession are free from tenure; for a tenant is he who holds of some lord by service, and the king cannot be a tenant, because he hath no superior but God: neither may the king be joint-tenant with any, for none can be equal with him.—8 *Co.* 118.

The king's grant is taken strongly against a stranger, and more favourable for the king; contrary to the grants of a common person: and if the king grants land in fee-simple, upon condition that the grantee do

not alien or sell the same, it is good; though void in others.—*Plowden's Com.* 243.

Where a right or title of the king and the subject concur and meet together, his title shall be preferred; and the king's title is not to be tried without warrant from the king, or assent of his attorney-general.

No distress can be made upon the king's possession; but he may distrain out of his fee in other lands, &c., and may take distresses in the highway: the king may also distrain for the whole debt or debts due of one tenant, where the estate is let to several.

In whose hands soever the goods of the king come, their lands are chargeable, and may be seized for the same; and the king is not bound by the sale of his goods in open market.

The debts of the king shall be satisfied before those of a subject, for which there is a prerogative writ; and until his debts be paid he may by writ protect his debtor from the arrest of others; but although the king's debt is to be first paid, that must be when it is in equal degree with the subject's.—*Plowd. Com.* 241.

No prescription of time runs against the king; he is not within the statute of limitation; an entry shall not bar him; nor will any judgment be final against him, but with a *salvo jure regis.*

The king cannot be nonsuit, as he is supposed to be present in all his courts; and he may have such process in his suit, as no other person but himself can have: and an action lies not against the king, but a petition instead of it, to him in the Chancery.

The king is the fountain of honour and justice; all statutes are to have his royal assent, and in calling or

dissolving parliaments, declaring war and peace, &c., his proclamation has the effect of a law.

Also acts of parliament are not binding to the king, unless they concern the commonwealth, or he be specially named.

But notwithstanding the king's prerogative is so large, as we find that to be law almost in every case of the king, that is law in no case of the subject:

Yet the king may not by petition or bill, &c. dispose of any man's lands or goods.

Nor shall he take that he hath a right to, which is in the possession of another, but by due course of law.

He may not command a man to prison against the writs and processes of law; *nihil potest rex quam quod de jure potest.*

For the law is the rule of the king's prerogative, which does not extend to any thing injurious to others. —*Plowden's Com.* 487.

And as the subject owes to the king his true and faithful obedience, so the king is to defend the laws and protect the bodies and goods of his subjects.— *Protectio trahit subjectionem, et subjectio protectionem.*

Salus populi suprema est lex: the health and welfare of the people is the highest law.

The main end of government is the common good of the subject; and by the same law which ordains our kings, the meanest of the people enjoy the liberty of their persons, and property of their estates, which it is every man's concern to preserve to the utmost.

In cases that are for the general good of the people, a man can justify doing of a wrong; as in time of war a person may erect bulwarks on another man's lands:

and hence it is, one may at any time raze an house that is burning, for the safeguard of neighbouring houses. —*Plowden's Com.* 322.

Trade being for the benefit and good of the people, bonds to restrain the exercise of it are held void; and the instruments of a man's trade or profession may not be distrained, as the books of a scholar, axe of a carpenter, &c.

But this is understood when other things may be taken as a distress.—*Co. Lit.* 47.

Semel malus semper præsumitur esse malus: those who once are evil are always presumed to be so.

This hath been understood *in eodem genere mali,* in the same kind of evil; as perjured persons, who have once forsworn themselves, and thereof are convicted, will not be afterwards admitted to give evidence in any cause, because they have once so offended.

And no infamous person, or one attainted of false verdict or conspiracy, or convicted of forgery or felony, or one who had stood in the pillory for an infamous offence, &c., was allowed to be a witness.—*Co. Lit.* 6.

But if a man convicted of felony, or who had stood in the pillory, was afterwards pardoned, it restored him to his credit as a new man, and he might be a good evidence.—2 *Hawk. P. C.* 397, pl. 48.

Substantia prior et dignior est accidente: the substance is more worthy, and before the accident.

No declaration or court in a suit at law shall abate, so long as the matter of action is fully showed in sub-

stance in the declaration and the writ, as is provided by the statute 36 *Edw.* 3, st. 1, c. 15.

And no judgment shall at any time be arrested or stayed in any court of record, for want of any matter of form in the declaration, plea, &c., or for any defect whatsoever, except only matter of substance, which shall be showed publicly to the judges of the said courts.—18 *Eliz.* c. 14.

After verdict is given in an action, in the courts at Westminster, the judgment shall not be reversed by writ of error, for any faults either in form or substance, in any bill or writ, &c., or for variance therein from the declaration or other proceedings.—5 *Geo.* c. 13.

Ubi major pars est, ibi est totum: where the major part is, there by the law is the whole.

The only way of determining the acts of many is by the major part or a majority; as the major part of members of parliament enact laws, and the majority of electors choose the members of parliament; and the act of the major part of any corporation is accounted the act of the corporation.

A dean and the major part of the chapter make the spiritual corporation, and their act is binding though the rest do not agree to it; for the whole chapter is said to do what the major and sounder part doth.

And the consent of such major part is expressed by fixing their seal; which consent is the will of many joined together.—*Dav. Rep.* 48.

Veritas nihil veretur nisi abscondi: truth fears nothing but to be concealed.

And truth is nothing else but an affection of our

speech and actions agreeing with the mind; but is properly called *veracitas*, that is a speaking of truth; of which it is to be understood that it is afraid of nothing more than to be obscured.—*Plowden's Com.* 59.

Fraud and covin are so mixed with truth, as they often deceive, and put a false gloss upon the worst things; though the law will never permit them to suppress the truth where it can be discovered.

And in all cases it labours to make a discovery, and censure corruptions.

Vigilantibus non dormientibus leges subveniunt: the laws help those that are watchful, and not those that are sleepy and negligent.

For want of being watchful, and by negligence, a right may be lost; as where an action is not brought within the time appointed by the statutes of limitations.

All actions of debt, upon the case (except for words), actions of account (other than concerning merchandize), of detinue, trover, and trespass, must be commenced within six years after the cause of action. So also in ejectment within twenty years after the title accrued.

By the common law, claim was to be made within a year and a day after a person was disseised of land, or he could not enter; and if a feme sole was disseised before marriage, and then took an husband, then a descent of the lands during the coverture took away her entry.—*Co. Lit.* 95. For when the statute begins to run, it never ceases.

CHAPTER III.

OF PRIVATE AND PUBLIC INDIVIDUALS, THEIR RIGHTS AND DUTIES.

SECT. 1.—*Of the Sovereign.*

ONE of the most important advantages of the laws of England are the rights and duties of persons as they are members of society, and stand in their various relations to each other. These relations are either public or private, the most universal relation being that of magistrates and the people; and the private relations of life will be readily understood to consist of husband and wife, father and child, master and servant.

Of the King or Queen.]—The supreme executive power of the kingdom is vested, by law, in the king, or queen regnant.

The principal duty of the sovereign is to protect and govern the people according to law; it is also a maxim of that law that protection and subjection are reciprocal; the sovereign is also bound to execute judgment in mercy; and to maintain the established religion of the land.

The sovereign being of special pre-eminence above the people, is possessed in right of the regal dignity of certain prerogatives, which are either *direct* or *incidental*.

Direct prerogatives of the crown are rooted in and spring from the political person of the sovereign, as the right of sending ambassadors, waging war, or making peace.

Incidental prerogatives are only certain exceptions in favour of the crown, such as, for instance, that no costs shall be recovered against the king; that the king cannot be a joint tenant, and that his debt shall be preferred to the debt of his subjects.—1 *Black. Com.*

There are also certain other prerogatives attached to the royal *character* in itself; to the royal *authority;* and also those prerogatives which are connected with the immediate revenues of the crown.

Thus the sovereign is declared to be supreme head of the state, both in civil and ecclesiastical matters. The law also ascribes to him in his political capacity, absolute perfection, and thus by a maxim of the law, the "king can do no wrong." As the head of the law he is ubiquitous, and always said to be present in court. Another attribute of the majesty of the sovereign is, that the law ascribes to him an absolute *immortality;* and thus it is said that "the king never dies." Henry, George, or William may die, but the king always survives. Immediately the reigning prince dies in his natural capacity, the imperial dignity becomes vested in his heir without any *interregnum*.

By another prerogative of the crown, the sovereign (as the representative of the entire people) has the sole power of sending ambassadors to foreign states, receiving ambassadors at home; of making treaties, leagues

and alliances with foreign princes; the power of declaring war or making peace; the granting of safe conducts, without which, by the law of nations, no member of one nation has a right to intrude upon another; and also the power of ennobling, because all subordinate dignities must spring from the crown.

The principal remaining prerogatives connected with the crown are those relating to mere domestic commerce, such as the right of establishing public markets, and granting tolls therein; the regulation of weights and measures; and the coining of money.

Lastly. The fiscal prerogatives, or such as regard the *revenue*, which the constitution of our country has vested in the royal person, are as follows:—

First. The custody of the temporalities of bishops, *i. e.* the lay revenues of an archbishop's or bishop's see when the same is vacant, and the right of presentation to all benefices and preferments therein which may fall during the vacancy.

Second. The sovereign is entitled to a corody out of every bishopric, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him until the bishop promotes him to a benefice.

Third. All tithes arising in extra parochial places, under the implied trust that the sovereign will distribute them for the good of the clergy in general.

Fourth. All the revenues of first-fruits and tenths as vested by the statute of 2 Anne, c. 11.

Fifth. The rents and profits of the demesne lands of the crown, which at present, however, are very small, in consequence of their having been granted away almost entirely to private subjects.

Sixth. Another branch of the ordinary revenue of

the sovereign consists in the profits arising from the royal forests, and are composed chiefly of fines for offences against the forest laws.

Seventh. There are also certain fines imposed upon offenders in courts of justice payable to the crown, as are also forfeitures upon recognizances, and forfeitures by defaulters.

Eighth. Another branch of royal revenue is the right to royal fish, which are the whale and sturgeon; these fish when caught near the English shores, are the property of the sovereign, on the ground of his protecting the seas from pirates and robbers.

Ninth. There is also another maritime revenue founded also on the same reason, viz. the right of shipwrecks, but it must be observed that in order to constitute a legal wreck the goods must come to land.

Tenth. The right to mines of silver and gold, which owes its origin to the sovereign's right of coining money.

Eleventh. Treasure trove or *thesaurus inventus*, which consists of treasure of silver or gold in plate, money, bullion, &c. found in the earth, also belongs to the crown.

Twelfth. Waifs, *bona waviata*, goods stolen and thrown away by a thief in his flight, are given by law to the crown, as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him.

Thirteenth. Estrays, which are such valuable animals as are found in any manor or lordship without any man knowing the true owners thereof, these also belong to the king, or queen regnant, as lord paramount of the soil.

Fourteenth. Forfeitures of lands and goods for crimes and offences against the law also belong to the crown, as do also those forfeitures which are commonly called deodands.

Fifteenth. Lands which are escheated by reason of the defect of heirs, also belong to the crown.

Sixteenth. Another prerogative of the crown consists in the custody of lunatics and idiots.

The remaining branches of the revenue of the crown consist of taxes, aids, subsidies, and supplies, granted by the commons of Great Britain and Ireland, in parliament assembled, and are described by *Blackstone*, in his Commentaries, book i. c. 2, as the king's *extraordinary* revenues.

SECT. 2.—*Of subordinate Magistrates.*

These are principally Sheriffs, Coroners, Justices of the Peace, Constables, Surveyors of Highways, and Overseers of the Poor.

The *Sheriffs* are officers of great antiquity, and they perform all the queen's business in the county; they are appointed yearly. In their judicial capacity they are to hear and determine all causes of 40*s.* and under.

They may also apprehend and commit to prison all persons who break the peace; they are bound to pursue all felons and murderers, and for these purposes they may command all the people of their respective counties to attend them, which is called the *posse comitatus*, or power of the county.

The sheriff is also bound to execute all processes issuing from the queen's courts, and likewise to preserve all rights of the queen within his bailiwick.

The *Coroner* is also a very ancient office. There are particular coroners for every county, usually four, but sometimes more in number. The coroner is chosen for life. His principal duties are to enquire into the causes of violent or sudden deaths, and also of those which take place in prisons, and these enquiries must be made by a jury, over whom he presides.

If any person be found guilty of murder or manslaughter by the coroner's inquisition, he is committed to prison upon the coroner's warrant.

Sometimes process is awarded to the coroner instead of the sheriff, *ex. gratiâ*, when the sheriff himself is plaintiff or defendant in the suit.

Justices of the Peace (the principal of whom is the *custos rotulorum* or keeper of the records of the county) are appointed by the king's special commission under the great seal.

Their duty is to preserve the peace, and any two or more of them may enquire into and determine felonies and misdemeanors committed within the limits of their jurisdiction.

The office subsists only during the king's pleasure, and is determinable by demise of the crown, by express writ, and by superseding the commission.

The general duty of *Constables* is also to keep the peace within their respective districts, and for that purpose may apprehend, imprison, and in some instances break open houses, and the like.

There are two descriptions of constables, high constables, and petty constables; the former are appointed at court leets, and sometimes at quarter sessions, the

latter are generally appointed by two justices of the peace.

As every parish is bound to keep its own high roads in repair, this care is consigned to a *Surveyor of the Highways.* His duties are to remove all annoyances from the highways; to call together the inhabitants of the parish to assist in repairing the public roads; to erect guide posts, make drains, and generally to purchase materials for the repair of highways; and in case the personal labour of the parish is not sufficient, then, with consent of the justices at sessions, to levy a rate in aid of the personal duty.

Overseers of the poor were first appointed by the 43rd of Elizabeth. They are nominated yearly in Easter week. Their duties are, as their name signifies, to attend to the necessary relief and employment of the poor, and these duties are principally defined by the *4 & 5 Will.* 4, c. 76, and the subsequent acts amending the same.

All overseers must be substantial householders, and are so expressed in their appointments.

SECT. 3.—*Of the Clergy.*

The clergy are considered by our law as persons set apart for the service of the Almighty; therefore it is that they cannot be compelled to serve on juries, nor compelled to serve any temporal office, as constable, &c.

During attendance on divine service, a clergyman is privileged from arrest.

They are incapable of sitting in the House of Commons, which is a secular duty, neither can they renounce the holy office to enable them to do so, because the maxim is, "once a priest, always a priest."

They must not engage in trade, or farm more than a certain quantity of land.—1 *& 2 Vict.* c. 106.

The various ranks and degrees of the clergy consist of *Archbishops* and *Bishops*, who have the superintendence of the clergy within their respective sees, and have also the power to inflict punishment upon them by ecclesiastical censures.

A *Dean* and *Chapter* are the council of the bishop, to assist him with advice in affairs of religion, and also in the temporal concerns of the see.

The chapter consists of canons and prebends, and these are sometimes appointed by the king, sometimes by the bishop, and sometimes by the chapter.

The dean and chapter are the nominal electors of the bishop.

Archdeacons have ecclesiastical jurisdiction immediately subordinate to the bishop, either thoughout the diocese or in some particular division of it.

They are usually appointed by the bishop. An archdeacon visits the clergy, and has his own court for the punishment of offenders, and for the hearing of matters of ecclesiastical cognizance.

Rural Deans are very ancient officers of the church,

but had gradually fallen into decline, until very recently, when the office appears to have in some degree been revived.

The rural deanery is a subdivision of the archdeaconry.

Rectors and *Vicars* form the chief numerical order in the ecclesiastical polity of England.

The distinction between a rector and vicar is, that the former has for the most part the entire right to all ecclesiastical dues in the parish, but a vicar is entitled only to the small tithes, since he generally has an appropriator over him, who takes the best part of the profits.

The principal part of the duties of clergymen are under ecclesiastical cognizance, but very many other duties are also imposed by the statutes.

Rectors and vicars may be deprived of their preferments by the bishop for felony, heresy, simony, preaching false doctrines, and for improperly absenting themselves from their benefices.

They may be also otherwise punished for misconduct by sentence declaratory in the ecclesiastical courts.

A *Curate* is of the lowest degree in the church, being an officiating temporary minister, and paid by salary from the proper incumbent; there are however *perpetual curacies*, to which some portion of the tithes of a parish are appropriated.

Churchwardens are inferior officers of the church, sometimes appointed by the incumbent of the parish, and sometimes by the parishioners themselves.

Their duty is to assist the ecclesiastical jurisdiction,

to repair the church, and to see that the Sabbath is properly observed; there are also a variety of other parochial matters entrusted to them by act of parliament, among which is their duty of assisting the overseers of the poor.

Parish Clerks and *Sextons* are in most instances persons who possess a freehold in their offices by common law, and therefore although they cannot be deprived, yet they may be punished by ecclesiastical censures.

Sometimes these persons are appointed by the incumbent of the parish, but in many instances local customs have vested the right of electing them in the inhabitants of the parish.

Sect. 4.—*Of Master and Servant, Husband and Wife, Parent and Child, &c.*

The chief relation of private life are those of master and servant, husband and wife, parent and child, guardian and ward.

With respect to the first of these divisions it is to be remembered that there are two sorts of servants, menial servants or domestics, and apprentices.

The master is said to hire the former upon going into his service; and if this hiring be general, the law presumes that it lasts for a year, upon the principle of equity, that the servant shall serve and the master maintain during all the revolution of the respective seasons.

The contract of hiring and service may however, in

all cases, be made for any shorter or longer term than a year.

Apprentices are usually bound by a deed indented to serve their masters for a term of years, and to be instructed by them. This is usually done by and to persons in trade, to learn the particular art or mystery of the master.

Apprentices to trades may be discharged upon reasonable cause, by application at the quarter sessions, or to justices of the peace. Generally the parents of apprentices are parties to the deed whereby they are bound, in order that the master may have a sufficient covenant for the good behaviour and faithful conduct of the apprentice.

Other servants are called or distinguished by the names of stewards, factors, bailiffs, and labourers.

A master may correct an apprentice in moderation for misbehaviour, but if servants of full age are beaten by either the master or mistress, it is a good cause for their quitting their service.

All servants and labourers become entitled to wages in consideration of their services, but generally speaking apprentices receive no other reward for their labours than the information and learning in business which they derive from their masters.

A master may bring an action against any person for beating his servant, and he may also justify an assault in defence of his servant.

And by the maxim of law, *facit per alium facit per se*, if the servant commits trespass by the command of his master, the master is considered guilty of it, although the servant is not thereby excused; so also if any inn-

keeper's servant robs his master's guests, the master is accountable to the guest for the articles stolen. In like manner, where a servant is permitted, in the usual course of his business and employment, by the master to receive money, or to order goods, let lands, &c., the master is accountable and must stand to the bargain made by the servant.

The neglect of a servant is also sometimes considered to be the neglect of the master, provided the damage be done while the servant is actually employed in the master's service.

Of Husband and Wife.—By the legal consequences of marriage, husband and wife are considered as one person in law.

A man cannot grant any thing to his wife, or enter into any covenant with her, for the grant would be to suppose her separate existence in law, and the covenant would be with himself.

All contracts made between a man and a woman when single, are avoided by their intermarriage.

A husband, however, may bequeath any thing by will to his wife, because the bequest cannot take effect until after the marriage is put an end to by death of the husband.

The husband must provide the wife with necessaries, and if she contracts debts in respect of such necessaries, the husband is liable in law to pay for them.

But if a wife elopes from her husband, then he is not liable for necessaries, if the person furnishing them is aware of the elopement.

If the wife's property or person is injured she can bring an action for redress, without the husband's con-

currence and in his name, and she cannot be sued except by the husband being made a defendant.

But where the husband is banished, or has abjured the realm, then it appears that the wife may both sue and be sued in her own name.

In trials of any kind they cannot be evidence for or against each other, partly because it is impossible that they should give impartial testimony, but chiefly on account of the union of person.

There is an exception to this rule, in cases of assault and criminal violence practised upon the wife.

In some felonies and inferior crimes, committed by the wife under constraint of the husband, the law excuses the wife, but this rule does not extend to treason or murder.

All deeds executed by the wife during her marriage are void. She cannot devise lands to her husband (except in certain cases) by will, because she is supposed to be acting by his coercion and under his controul.

A married woman cannot alienate or dispossess herself of any freehold estate during her marriage, except under the provisions of the 3 & 4 *Will.* 3, c. 74; by the provision of which act the more expensive process of the levying of fines by married women is abolished.

Parents and Children.—The duty of parents to provide for the maintenance, education, and protection of their children is one of the principles of natural law.

By the English law, the parent is obliged to maintain the child at his own charge, if of sufficient ability.

But the law does not enforce parents to leave children any certain provision by will, neither does it pre-

vent a father from disinheriting his son; every man's property is left at his own disposal, upon the principle of liberty in this, as well as every other action of life.

Heirs and children are however favoured by the courts of justice, and cannot be disinherited by doubtful words.

The utmost certainty is always required of the testator's intention, to take away the right of an heir.

A parent may uphold his child in the maintenance of law suits, without being guilty of the legal crime of maintaining quarrels.

The remaining duty of parents is to give their children educations consistent with their stations in life.

A parent may lawfully correct his child under age, in a reasonable manner, because it is for the benefit of his education.

The consent of a parent to his child's marriage, if under age, is also necessary by law, and formerly without it the contract was void.

A father has no power over his son's separate estate, except as his trustee or guardian, and must account for the profits when the child comes of age.

The father has a right to his childrens' services whilst they live with him, in like manner as that of an apprentice.

The legal power of a father over his son ceases at the age of twenty-one years; and until this age arrives, the father's control continues, even after death, since he may appoint a guardian to his children.

There are also certain duties enjoined by law from children to their parents, such as their maintenance, when unable to maintain themselves by impotence or infirmity.

Illegitimate children can inherit nothing. But they may gain a surname by reputation.

They cannot be heirs to any one, nor can they have heirs except of their own bodies.

An illegitimate child can however be made legitimate by act of parliament, as was done in the instance of John of Gaunt's children by a statute of Richard the Second.

Guardians and Wards. This species of relationship very nearly resembles that of parent and child.

Guardians by nature are the father, and in some cases the mother of the child; and if an estate be left to an infant, the father is by common law entitled to the guardianship; but he must account for the profits to the child when it comes of age.

Guardians in *socage* are so called, when the infant is entitled to some estate in lands, and then the law gives the guardianship to his next of kin, or to some person upon whom the inheritance cannot descend, because the law considers it improper to trust an infant in the hands of a person who by possibility may inherit the estate.

Guardians in socage continue only until the minor is fourteen years of age, and then he may choose his own guardian.

There are also testamentary guardians, or those appointed by will.

And certain special guardians, by the custom of London and other places; but they do not fall under the general law.

Infants have various privileges and various disabilities; but as Blackstone says in his Commentaries, their

very disabilities are privileges, and protect them from wrong.

An infant cannot be sued, except in the name of his guardian, for he is supposed to defend him against all attacks of law.

He may sue by his next friend, who is not his guardian, and any person who will undertake the infant's cause.

In criminal cases an infant under the age of seven cannot be punished for any capital offence.

With regard to estates, an infant cannot alien his lands, nor make a contract which will bind him.

But he may bind himself to pay for necessaries, as meat, drink, clothing, and education, whereby he may profit himself.

It is generally true that an infant can do no legal act; yet an infant may present to an advowson, when it becomes void, to prevent the worse consequence of the benefice being vacant.

An infant may purchase lands during his minority; but he may agree or disagree to the purchase when he comes of age, if he thinks proper, without assigning any reason therefor.

CHAPTER IV.

OF OFFENCES AND PUNISHMENTS.

To constitute a crime in law there must be a vicious act and vicious intention.

There are three cases in which the will does not act, viz. where there is a defect of understanding, as in idiots, lunatics, and infants of tender years; secondly, where, although the understanding and will exist, they are not called forth at the time of the act done; which are offences by chance or ignorance; thirdly, where the act is constrained by some outward violence, as compulsion or necessity.

Insane persons cannot be tried for acts done by them when in sound health of mind, and if after trial they become mad, judgment cannot be pronounced upon them.

The voluntary madness produced by drunkenness is considered rather as an aggravation of the offence than any excuse for criminal misbehaviour.

A man may be a principal in an offence in two degrees. A principal in the first degree is the actual perpetrator of the crime, and in the second degree, is the party who aids and abets in the act done.

A felon refusing to put himself upon his trial, and to plead, was formerly condemned to undergo the penance of *peine forte and dure*, and be pressed to death; but if he stand mute by the act of God, it shall be inquired of, &c.

In high treason, standing mute is equivalent to a conviction; and judgment, corruption, &c., follow. And so in cases of felony and piracy, by statute 12 *Geo.* 3, c. 20, he shall be convicted of the same, and judgment and execution be thereupon awarded, as if he had been convicted by verdict or confession of the crime.

An *accessory* is where a person is guilty of some felonious offence but not principally concerned, though he is a partaker in the crime.

An accessory before the fact, is he that advises, commands, or procures another to command felony, and is absent when done; if he be present, he is a principal.

And an accessory before the fact may be tried either in the county, where the principal felon is tried, or where the offence of being accessory was committed.

The accessory after the fact, is one who receives, assists, or comforts a man whom he knows to have committed felony or murder.—*Hale's P. C.* 218.

But the felony must be complete at the time of the assistance given.

If one commands another to beat a person, and he beats him so that he dies, the person commanding shall be accessory to the murder: and in case A. commands B. to kill C. with a gun, who kills him with a sword, A. is accessory, because the killing was the substance.

But here in this case, if B. by mistake kill D., it is murder in B., but A. is not accessory thereto.

And where a person commands another that he steal a black horse, and he steals a white one, &c. or if the command be revoked, the commander shall not be accessory.

And there cannot be an accessory before the fact in manslaughter, by reason it is done of a sudden, and not premeditated.

A woman that receives or assists her husband is not accessory; but a husband receiving his wife makes him an accessory to her offence; a brother receiving his brother may be accessory; so a servant relieving his master, &c.

The furnishing others with weapons, finding a felon a horse for his journey, or relieving him with money or victuals, knowing him to be a felon, will make persons accessory.

If the owner of things stolen, after complaint to a justice, take his goods, and consent to the escape of the felon, or compound the offence, it is said he may be accessory after the fact.

Though it is otherwise if done before such complaint made.

Receiving an accessory to a felony, makes one accessory to an accessory.—*Hale's Sum.* 219.

The sovereign is in all cases the proper prosecutor for every public offence, being considered as the centre of majesty over the whole community, and is supposed therefore to be the person chiefly injured by any infraction of public rights.

SECT. 1.—*Offences against the Queen and Government.*

The principal offences known to our law are those against the life and person of the sovereign, and against the security of the state, and which are called *Treason:* formerly this term was divided into high and petit treason, but at present high treason is the only description of that offence known to the law.

Treason in general signifies a betraying (*proditio*), and is defined to be an offence committed against the security of the queen or kingdom:

As to compass or imagine the death of the king, queen regnant, queen consort, or prince, their eldest son and heir; and declaring the same by some open deed;

Or to levy war against the queen in this realm:

Or to adhere to the queen's enemies, or give them aid within the realm or without;

Or to violate the queen regnant, or the king's wife, or his eldest daughter unmarried, or the wife of the prince; this does not extend to a queen dowager or princess dowager;

Or to kill the chancellor, treasurer, or any of the queen's justices of either bench, justices of assize, &c. in their place doing their offices.

These were all declared treason by the statute *25 E. 3*, c. *2*. And an open act having a design to depose or imprison the king, is an overt act to manifest a compassing of his death.—*Fost. Cr. Law*, 195, s. 3.

The mere compassing is an act of the mind, and is considered as the treason, the overt acts as the means made use of to effectuate the intention of the heart;

and as the overt act is the charge which must be alleged and proved, it is that to which the prisoner must apply his defence.

Conspiring the death of the king, or queen regnant, providing weapons to effect it, or sending letters to second it; assembling people to take the king or queen into their power, and writing to a foreign prince inciting to invasion, are overt acts.—*Hale's P. C.* 13.

A compassing by bare words was formerly held to be no overt act of treason; but since it has been adjudged otherwise; where the words show a direct purpose against the life of the king or queen regnant, then they amount to an overt act of compassing or imagining his death.—*Kel. Rep.* 13; see *Hale's P. C.* 111; *Hawk. P. C.* 395; *Read. Stat. Law*, 146; *Hensey's case* in *Fost.* 198, 202, s. 8; *Bur.* 642.

But the words must be attended or followed by some consultation, meeting, or act, and then they are evidence of the treasonable intentions of the party.

Words, though set down in writing, if kept privately in a man's closet, are no overt act, except they are published.—*Hawk. P. C.* 38, s. 32, but see *Fost. Cr. Law*, c. 1, p. 198.

The law judges every rebellion to be a plot against the life of the sovereign, and also a deposing in itself.

And under compassing and imagining the death of the king or queen regnant, intention of treason proved by circumstances, is punished as high treason; for men's actions are governed by their intentions.—*5 Mod.* 207, 208.

A conspiring or compassing to levy war is not an overt act, without a war levied *de facto*; but if a war be

actually levied, the conspirators are traitors, although not in arms.

And a conspiracy to levy war, it is said, will be evidence of an overt act for compassing the king's death. —3 *Inst.* 14; *Fost. Cr. Law,* 211.

Not only such persons as take up arms against the king or queen regnant, but all who in a violent manner withstand his lawful authority, or attempt a reformation of his government, do levy war against him.

Those that make an insurrection to redress any public grievance, whether a real or pretended one, are said to levy war against the king, and to be guilty of treason, though they have no design against his person.—*Hawk. P. C.* 37, s. 25.

And Lord Mansfield declared it to be the opinion of the court, that an attempt by intimidation and violence to force the repeal of a law, was a levying war against the king, and high treason.—*Doug.* 570.

So where great numbers by force endeavour to remove certain persons from the king or queen regnant, or to lay violent hands on a privy councillor or magistrate for executing his office; or to change religion or the law, to cast down all inclosures, &c.

But raising a force to burn, or throw down a particular inclosure, being a grievance to men's private interest, is only a riot.

Holding a castle against the queen's forces, is a levying of war; and keeping together a great number of armed men against the express commands of the king or queen regnant, has been held treason.—*Fost.* 219.

Persons who have joined with rebels *pro timore mortis et recesserunt quam cito potuerunt,* are not guilty of

this offence.—*Hale's Sum.* 14; *Hale's P. C.* 59; *Fost. Cr. Law*, 105.

The adhering to the queen's enemies, is proved by giving to such any comfort or relief, or being in counsel with any to levy any seditious wars.

To deliver or surrender up the queen's castles or forts to an enemy for reward, &c. is an adherence to the queen's enemies and high treason.—*Fost.* 219.

It has been adjudged that adhering to the queen's enemies is an adherence against her.

And as adhering to the enemies of the queen out of the realm is treason, one beyond sea having solicited a prince there to invade the kingdom, was held guilty of high treason, and triable by statute.—*35 H.* 8, c. 2.

So sending intelligence to an enemy of the destination of our own armaments, or the particular state of our own defences, is high treason, though the intelligence never reaches him.—1 *Burr.* 650; 6 *Term. Rep.* 527.

This may be inquired of and tried in the Court of Queen's Bench, or by special commission in any county the queen shall appoint; and the adherence out of the realm must be alleged in some place in England.—3 *Inst.* 11.

An enemy coming hostilely into England, shall be dealt with as an enemy, and executed by martial law, or ransomed; he cannot be arraigned for treason, because he never was within the king's allegiance.—*Ibid.*

But a subject of the queen, assisting a foreign enemy, shall be dealt with as a traitor.

If on the queen's subject becoming a rebel, one that is out of the realm succours him, this is not an adhering to an enemy within the statute of *Edw.* 3.

When one knows another has committed treason,

and does not reveal it to the queen, or some magistrate, that the offender may be brought to justice, by our ancient law, it is high treason.—*Bract.* c. 3, s. 1; *Fost. Cr. Law*, 195.

For the delay in discovering the treason was judged as an assent to it: but now there must be an actual assent to some outward act, to make concealing it treason; or will be only a misprision.—1 & 2 *P. & M.* c. 10.

A person has notice of a meeting of conspirators, goes into their company, and hears their treasonable consultation, and conceals it; this is treason.—*Fost. Cr. Law*, 195.

And so it is where one by accident has been in such company, and heard their discourse, if he meets them a second time; which shows an approbation thereof.—See *Kel.* 12.

Though if one is told in general that there will be a rising or rebellion, and does not know the persons concerned, or the place where, &c. this may be concealed, and not be treason or misprision.—*Hawk.* 56.

Violating a king's wife was high treason at common law; because it destroyed the certainty of the king's issue, and raised contentions about the succession of the crown.

If the queen consort consents, it is treason in her; but this extends not to a queen dowager. The same law of the prince's wife; to violate whom is only treason during the marriage; the eldest daughter of the king is she that is then living and not married at the time of the violation.

And though there was an elder than her, who died without issue; because now she has a right to the in-

heritance of the crown, on failure of the issue male.—*3 Inst.* 9.

Treason against the life of the queen consort must be also during coverture, and does not extend to a dowager queen.

In every case of treason that relates to the king's person there must be overt acts of it; which are to be made appear by plain and sufficient proof, and not by conjectures.

The offender must be lawfully attainted thereof, either by confession, or by his peers in his life-time;

And, therefore, if a person be slain in open war, he shall forfeit nothing, nor can he be attaint in such a case, but by parliament.—*Hale's P. C.* 10.

Infants within the age of discretion, and persons *non compos mentis*, cannot be guilty of treason; so that if a traitor becomes *non compos* before conviction, he may not be arraigned, and if after, shall not be executed. *Ibid.*

A person indicted for high treason, is to have a copy of his indictment, and list of witnesses, five days before trial, and shall be admitted to make a full defence, by counsel learned in the law, and by lawful witnesses, &c.—*Frost's* case, argued in Court of Exchequer, Hil. T. 1840.

And there must be two witnesses to the same overt act, or two acts of the same treason, produced face to face, to make out the treason against him.—7 *W.* 3, c. 3.

All are principals in high treason; and on an attainder of treason, the judgment in all cases, except for counterfeiting the coin, is, that

The offender shall be drawn on a hurdle or sledge to the place of execution,

And there be hanged by the neck, but cut down alive, his bowels ript up, taken out, and burnt before his face;

His head severed from his body, his body divided into four quarters, and those be disposed of as the king thinks fit. Though where a peer commits treason, the king usually remits all but beheading.—3 *Inst.* c. 101.

To print or publish seditious libels against the queen or her government are grave misdemeanors, and the punishment for a seditious libel is fine and imprisonment.

A man may lawfully discuss the measures adopted by the queen and her ministers, but it must be done fairly, temperately, and with decency, without attributing corrupt motives.—*R.* v. *Lambert*, 2 *Camp.* 398.

If a man curse the queen, wish her ill, or give out scandalous stories concerning her, it is sedition.—*R.* v. *Harvey*, 2 *B.* & *C.* 257.

So also if he deny the queen's right to the throne in common discourse.—4 *Bl. Com.* 423.

Whether a defendant intended to alienate the affections of the people from the government or queen, or not, is immaterial.

The administering or taking unlawful oaths is a felony by the statute of 37 *Geo.* 3, *c.* 123, and the punishment for such offence is transportation for seven years.

Unlawful oaths are—

1st. To engage in some malicious or seditious purpose.

2nd. To disturb the public peace.

3rd. To be of some association or confederacy for that purpose.

4th. Not to reveal or disclose unlawful combinations or illegal engagements.

Inciting to mutiny is also a felony, and is punishable with transportation for life, or not less than fifteen years, or imprisonment for not more than three years. —7 *Will.* 4 & 1 *Vict. c.* 91.

This offence is an endeavour to seduce persons serving in the army or navy to do any malicious act, or to commit any traitorous practice.

The crime of inducing soldiers to desert is punishable by 6 *Geo.* 4, *c.* 5.

A sailor or soldier in hospital is nevertheless a person serving in her majesty's forces.—*R.* v. *Tierney*, *R.* & *R.* 74.

Embezzling the queen's stores is punishable with transportation, or imprisonment with or without hard labour.

There are also several statutes in force making it punishable for having possession of any of the queen's stores, or selling or receiving the same; and persons buying stores of the commissioners of the navy or ordnance must have a certificate from them of such sale being made.—9 & 10 *Will.* 3, *c.* 41, &c.

Counterfeiting the Great Seal or Privy Seal is treason by stat. 11 *Geo.* 4 & 1 *Will.* 4, c. 66, and punishable by death.

And affixing the great seal without warrant, or taking off the wax impressed from one patent, and fix-

ing it to another, or erasing any thing out of a patent and adding new matter, although not a counterfeiting and treason within, is a great misprision.—*Hale's Sum.* 18; 3 *Inst.* 16.

Persons that aid and consent to the counterfeiting the great seal, are it appears equally guilty with the actors.

Counterfeiting the privy signet, or sign manual, is also treason within the act above mentioned, and made punishable in like manner.

Forging or *Counterfeiting the Queen's Gold or Silver Coin*, was treason by the common law; but by statute 2 *Will.* 4, c. 34, the counterfeiting, clipping, and filing money, or current coin of this kingdom, is now a felony and punishable by transportation or imprisonment, and with or without hard labour.

If any person bring into the realm counterfeit money, it is felony within the statute of 2 *Will.* c. 34, s. 19. But then it must be according to the similitude and likeness of English money, and brought from some foreign realm, knowing it to be false, and be uttered in payment.

The bare forging of the king's coin, without uttering, is felony.

The making of any stamp or die, for coining, except by persons employed in the mint, or conveying them from thence, is high treason; and colouring metal resembling coin like gold or silver, or marking on the edges, is likewise treason by 8 & 9 *Will.* 3, c. 26.

Persons washing, gilding, or colouring any gold or silver coin of the realm, or altering the impressions so as to make them resemble a sovereign or half a sove-

reign, are guilty of felony by the act of 2 *Will.* 4, c. 34.

And those who tender in payment any counterfeit coin knowingly, which is called uttering counterfeit coin, shall be imprisoned, with or without hard labour.

Counterfeiting the copper coin is not felony, but a misdemeanor; the offenders are liable to be imprisoned for a term not exceeding one year.

There are various other offences under the head of coining, all of which are made punishable by transportation or imprisonment, viz. having in possession three or four pieces of counterfeit coin, with intent to utter the same;—being possessed of and making puncheons, collars, presses, and other tools for coining money;—conveying coining tools out of the queen's mint, &c.

The counterfeiting *foreign* gold and silver coin is made a felony by the stat. 37 *Geo.* 3, c. 126, and is also made by transportation for any term not exceeding seven years.

The importation and uttering of counterfeit foreign coin are also distinct felonies, and are punishable as in the last instance.

In the instances of uttering base coin a second time after previous conviction, the offender is made liable to a longer term of punishment than for the first offence.

Any persons, may cut or break pieces of silver money suspected to be counterfeit, or unlawfully diminished; but if they prove good coin, shall stand to the loss.—9 & 10 *Will.* 3, c. 21.

SECT. 2.—*Offences against the Person.*

THE next crime is *Murder*, which is a wilful and felonious killing of another, upon malice aforethought.

This offence may be committed in divers ways:

As by weapon, crushing, or bruising;
By shooting, smothering, or poisoning;
And by strangling, starving, &c.

To constitute the crime of murder these things must concur: that it be committed by a person of sound memory and discretion at the time; it must be an unlawful killing; the person killed must be a reasonable creature, in being, and under the king's peace; and lastly, it must be done with malice aforethought, which may be implied as well as expressed.—4 *Bl. Com.* 195.

But the person wounded or hurt must die within a year and a day after the fact committed, or the law will presume he died a natural death.

If in that time the party dies, although it be by disorderly living, the wound, or other injury, will be judged the principal cause of his death, to make it murder.—*Kel.* 26.

Where a man that is *non compos* kills another person, that is not murder. It is the same of a lunatic during his lunacy. But he that incites a madman to kill a person, is a principal murderer.

And if one that is drunk killeth another, it is felony and murder by our law.—*Hale's Sum.* 43.

A person under the age of discretion kills a man, it is not felony; though if by circumstances it appears an infant under twelve years old could distinguish good and evil, and knew what he did, if he kill another, it may be murder; as if he hide the dead body, make excuses, &c.

It is not the bare killing, but malice, that makes the crime of murder, and the malice must be of corporal damage to the party; and if it be not continuing till the death, it is no murder.—*Hale's P. C.* 49.

This malice is either express or it is implied.

The express malice is, when it is evidently proved there was some ill-will or old grudge before the killing, and the fact was committed with a sedate mind, and a former design of doing it.

And implied malice is, where a person kills another having nothing to defend himself; as in going along a street, over a stile, or the like.

If a killing or murder be perpetrated through a direct purpose to inflict some personal injury to the person slain, it is said to be properly of express malice.—*Kel.* 126.

As where a man in cool blood maliciously and deliberately beats another in such a manner, beyond any apparent design of chastisement, that he dies;

In that case it is murder by express malice, though he did not intend to kill him;

For if a person voluntarily commits any violent or cruel act, which is attended by death, in judgment of law he is looked upon to do it of malice aforethought.

And where one executes his revenge in a cruel manner, with a dangerous weapon, and shows a malicious design of doing mischief, and death ensues thereon, it is express malice and murder from the very nature of the fact.—*Kel.* 127.

In cases of poisoning, and where one man kills another without any provocation, malice is plainly implied. If one resolves to kill the first person he meets, and kills him accordingly, it is murder, though he knew

him not; for there malice is implied against all mankind.

One lays poison to kill a certain person, and another takes it and dies, it is murder; it would be otherwise if laid to kill rats.

And if A., bearing malice to B., strikes or shoots at him, but misseth him, and kills C., this will be murder in A.; and if it were without *malice prepense*, then manslaughter.

In such case the malice intended to one, makes the death of another upon that malice, murder; and qualifies the act as if it had its due effect.

If a man does a thing that apparently must introduce harm; as where he runs among a multitude of people with a horse used to strike, &c. and one is killed, it is murder, if done with an intent to do harm.

For an intention of evil, though not against a particular person, makes a malice, and the fact thereon is murder.—*Hale's P. C.*

A person finds a boy stealing wood; he bound him to his horse-tail, the horse ran away with him, and killed the child, it was adjudged murder.

The causing an abortion, by giving a potion to, or striking a woman big with child, was formerly murder; but now it is a great misprision only, unless such child be born alive, and die of the bruise, and is made felony by 7 *Will.* 4 & 1 *Vic.* c. 85.

Formerly where the death of a bastard newly born was concealed, it was supposed to have been murdered; but now upon trials of women charged with murder, and the concealment of the birth of their bastard children, the same rules of evidence are observed as in other trials for murder; but if acquitted of the murder she may

be sentenced to imprisonment for concealment of the birth.

If an infant be laid under leaves of trees, and suffered to be destroyed by vermin, or a sick man in the cold, whereof he dies, either are a killing.—*3 Inst.* 48.

Of Murder, by Combat and Duelling.]—In case two persons fight in cool blood, on a former quarrel, and one of them is killed; and where upon a sudden falling out, one appears to be master of his temper, and kills another, it will be a murder.

For where there is a fighting between two, on such precedent quarrel, it may be presumed to be on malice prepensed.

And though two persons fall out early in the morning, and meet in the afternoon of the same day, if one be killed, it is murder, for their after meeting is of malice.

But if A. and B. are at malice, and reconciled, and after upon a new occasion they fall out, and B. is killed, it is held to be no murder.

So it is where they combat on malice, and being parted, afterwards they meet and fight upon a sudden, and one kills the other, by some it is not murder, because the first malice is satisfied.—*Hale's Sum.* 49.

Yet if the party killed, in the first combat had wounded the party slaying, it might be otherwise.

If there be a quarrel between two persons, and one challenges the other, who declines meeting him, but at length, upon importunity, and to vindicate his reputation, meets and fights, and kills the challenger, it is murder.—*Kel.* 27.

Though here, if the person challenged refuse to meet, and saith he shall go to-morrow to such a town, and being assaulted by the way, he kills the challenger, it is manslaughter only.

Where two persons, A. and B., fall out, and on a challenge they appoint the field, and each takes his second with him, if A. kills B. this is certainly murder in A.'s second; and it hath been also adjudged murder in the other second; but this last seems otherwise according to *Hale's Sum.* 51.

It is said by some that the seconds of the party killed are equally guilty of murder, by reason of the encouragement which they gave by joining with him.

A. and B. falling out on a sudden, they presently agree to fight, and each fetches a weapon, then they go into the field, and one kills the other, this is only manslaughter, because the blood never cooled.

It is otherwise if they appoint to fight the next day, or at any other time.

If there be malice between A. and B. and upon that malice they meet and fight, here, though A. gives the first blow, yet if B. kill him, it will be murder.—*Hale's Sum.* 47.

In the common law it is of no signification who begins the quarrel, or gives the first stroke; and no words, though ever so reproachful, are a sufficient provocation to extenuate the crime of murder;

But if angry words pass between two persons, and one pulls the other by the nose, whereupon the person assaulted kills him immediately, it is but manslaughter, from such a sudden quarrel.

If a man provoked by words or gestures, makes a push at a person before his sword is drawn, and a fight

ensues, wherein he who made the assault kills the other, it is murder:

Here, in case he had made no push till the other's sword was drawn, it would have been only manslaughter in the person killing.

A person assaults another with malice, though he be afterwards driven by the other to the wall, and there he kills him in his own defence, it is murder by reason of his first intent.

In this case if the party assaulted fly to the wall, and being still pursued, he kill the other, it is only manslaughter.

Two having malice prepense fight, and the servant of one of them not acquainted with the malice, takes part with his master, and kills the other; this is murder in the master, and but manslaughter in the servant.

But when there is a conspiracy to kill a man, but no malice against his servant, if the servant be slain, the malice against the master shall be adjudged to extend to his servant, the killing of whom is murder.

If two or more come together to kill, rob, or beat a man, or to commit a riot, and one of them kills a person, it is murder in all those of that party that are present, aiding or abetting thereto, or that were ready to aid him, though but lookers on;

All will be said to intend the murder; but it is otherwise if the lookers on came there by chance.

If offenders come into a park, and the park-keeper shoots at them, whereupon they fly, but he pursues, and they kill him, it is murder in all; for the first entry was with a malicious intent.

In robbing a park and committing murder, all are

held to be present that are in the same park, though half a mile distant and out of view.

If any person stand by and encourage another to slay a man; or where one comes with others on purpose to kill him, and stands by till the fact is done, it is murder in all present.

Killing a person endeavouring to part others fighting, though without any evil intention against him, is murder.

And where two men are fighting, if other persons looking on do not endeavour to part them; or to apprehend the murderer, if one be killed; they may be indicted and fined.—*Noy.*

Where any magistrate or minister of justice in the execution of his office, sheriff, constable, or watchman in doing his duty, or any one that comes in assistance of the king's officers, is killed, it is murder.

And here a person shall not be excused, by alleging that what he did was in a sudden affray, &c.

If a bailiff is killed, in executing a writ, or process, or a lawful warrant, though the process be erroneous, or he do not produce his warrant if he be a bailiff commonly known, it will be murder;

But here if the officer doth that which is unwarrantable, as if he break open the door of a house or window, to arrest a person in a civil case; or if he arrests a wrong person, or one upon a Sunday, &c., these acts are unlawful, and it is no murder, but only manslaughter to kill him.

Justifiable Homicide.]—If a man, without any provocation, is assaulted any where by another, in such a manner that it plainly shows an intent to murder him,

as by passing at him with a drawn sword, &c., he may justify killing such assailant.

Where one attempts to commit murder, robbery, or other felony, a man or any of his servants may lawfully kill him. So officers endeavouring to disperse a mob, by stat. 1 *Geo.* 1, *c.* 5.

Likewise if a woman kills a man, who attempts to commit a rape upon her, she may justify the doing it. —*Fost.* 274.

Rioters standing in opposition to a justice's command, the killing them is justifiable.

So if a felon will not suffer himself to be arrested, or if he flies for it, being pursued upon a hue and cry; or where a prisoner assaults such as conduct him to gaol, or his gaoler in endeavouring to escape, &c. killing such may be justified.—1 *Hale's P. C.* 494.

But this is only when an offender cannot be taken or secured without killing, and there must be in all such cases an apparent necessity.

And if a prisoner by duress of the gaoler comes to an untimely end, it will be murder.—*Hale's Sum.* 47; *Hale's P. C.* 466; 2 *Ld. Raym.* 1578.

There is one kind of killing excusable, where a man kills another *ex necessitate*, merely in his own defence; and another, when it happens by misadventure.

Manslaughter is where a person is killed upon a sudden falling out, without malice:

Or when one commits a voluntary and unlawful act, but without any deliberate intention to do it: and for this crime the offender formerly had the benefit of clergy for the first offence.

Where two suddenly fall out and fight, and one breaks his sword, on which a stander-by lends him another,

wherewith the adversary is killed, it is manslaughter in both the killer and the stranger.

And if a man in vindication of his friend, who is assaulted by another, presently takes up an instrument and kills the other, such act is manslaughter.—1 *Hawk. P. C.*

If a man is taken in adultery with another person's wife, and the husband presently kills the adulterer, this is a great provocation, and makes it but manslaughter. —*Kel.* 137, pl. 4; *Ventr.* 158, 159; *T. Raym.* 212; 2 *Keb. Rep.* 829, pl. 49; *Hawk. P. C.* 82, pl. 26; *Fost.* 296.

Two persons strive for the wall in a street, and one kills the other, it is manslaughter, and so it is if two play at foils, and one kill the other.—*Hale's Sum.* 57.

A man shoots off a gun in a city, or highway, which endangers the life of some person, and one is killed, it is manslaughter by the common law.

And if one throw stones over a wall, in a place where persons often resort, or at another in play, and kill any person; if it be done without any evil intention, it is manslaughter.

It is not murder, because there is no malicious intention to hurt; nor *per infortunium*, as he was doing an unlawful act.

Where a person shooting at the tame fowl of another, which is an unlawful act, kills a stander-by, it is said to be murder in such person.—*Fost.* 258.

If he shoot at a wild fowl, hare, &c. and be not qualified to keep a gun, or kill game, and kills any person, it is manslaughter. But see *Fost.* 259.

And if he is qualified to keep a gun, which makes

the intended act lawful, it is only chancemedley.—3 *Inst.*

Chancemedley and Se defendendo is where a man is doing a lawful act, without any intent of hurt to another, and one is casually killed thereby.

This may be in divers instances; as where a person casts a stone, or shoots an arrow in the fields, or other open place, and they happen to strike and wound a man, of which he dies.

If one be cutting down a tree, and the hatchet-head flies off, and kills a person; or where he is doing a lawful thing that may cause danger, and gives warning, after which a man is killed; these accidental killings are chancemedley.—*Hale's Sum.* 31.

So it also is, where a master in correcting his servant, or a schoolmaster his scholar, or an officer whipping a criminal, in a reasonable manner, happens to occasion their death.

It is likewise called manslaughter by *misadventure*, for which the offender shall have his pardon of course.

Se defendendo is where one kills another in his own defence, being under an inevitable necessity of doing what he did.

And any person, in his just defence, may kill others for the safety of his life; but if malice be coloured under a pretence of necessity, or one kill another before he need to do it, it may be murder or manslaughter.

If a person on some sudden falling out be attacked, and before a mortal wound is given he flies to the wall, or other unpassable place, as far as he can, to save himself, but being still pursued kills the aggressor, this is *se defendendo*.

In this *homicide*, the party assaulted is not excused, unless he give back to the wall.

But if the assault be so fierce and violent, and in such a place, that giving back would endanger his life, then he need not give back, to excuse the defence.—*Hale's Sum.* 41.

If A. assaults B. upon malice, who retreats to the wall, and then in his own defence kills A.; here, if it be in the highway, he shall be discharged; but if not, it is *se defendendo*.

Though in case A. retreat back to the wall, and there kills B., it is murder.

A man that kills another by misadventure, has of course his pardon: but if a person be only wounded, an action of trespass may be brought; and he shall have the same judgment as if done of malice.

For in that case the law takes notice of the damage of the party wronged, and not of the malicious intent, as in capital cases.

Felo de se, in our law, is where a man lays violent hands on and kills himself.

As in cases of murder, the death must ensue within a year and day after the stroke, &c. The act must be deliberate, and purposely done; and the person that commits it must be of the age of discretion, and *compos mentis*, or it will not be felony.

Therefore if a lunatic, during his lunacy, one distracted by a disease, an idiot, or infant, kills himself, none of these are felo de se.

A man that persuades another to kill him does not come under this name; his assent being void in law, and the person killing him judged a murderer.

Yet it is felo de se, where one maliciously endeavour-

ing to kill another, falls upon his own sword, whereby he kills himself; but here he is to be the only agent.

On a verdict found of felo de se before the coroner, the offender forfeits all his goods and chattels to the king, for the loss of a subject and breach of the peace: and by custom the body is buried in the highway, &c.

But the forfeiture is often saved by the jury's favourable finding the fact to be lunacy.—*Hawkins.*

There is a *maihem* or maiming, that is felony by our law.

As where any person on malice forethought, and lying in wait, cuts off the nose, puts out the eye, disables the tongue, or cuts off or disables any limb or member of another, with intent to maim or disfigure him.

An assault is an attempt to commit a forcible crime against the person of another: such as an attempt to commit a battery, murder, robbery, rape.

Striking at a person with a stick or fist, although the party misses his aim, is an assault.—2 *Roll. Ab.*

So also is the presenting a gun at a man, or pointing a pitchfork at him within reach of it.—1 *Hawk.* 62.

If parish officers cut off the hair of a pauper in the poorhouse by force it is an assault.—*Forde* v. *Skinner*, 4 *C. & P.* 239.

If one person advances towards another in a threatening attitude, and with intent to strike, and he is stopped before the blow takes effect, it is an assault.—*Stephens* v. *Myers*, 4 *C. & P.* 349.

A battery, in the legal signification of the term, is a beating and wounding, and a beating is not merely to strike forcibly, but every touching, however trifling, in

an angry, rude, or revengeful manner. For instance, holding a man by the arm and spitting in his face, striking a horse upon which he is riding, thrusting or pushing him in anger.—6 *Mod.* 172.

A defendant may justify a battery by proving that it was done in defence of the possession of his house or land, 2 *Roll. Ab.* 549, or to prevent the destruction of his goods, &c.

But in cases of trespass, the owner of the house or land must first request the trespasser to depart before he can lawfully lay hands upon him, and then if he refuses, so much force only must be used as is necessary to remove him.

If the trespasser use force however, then the owner may oppose force to force.—2 *Salk.* 641.

Attempting to drown is made felony by the stat. 7 *Will.* 4 & 1 *Vict. c.* 85, and is punished by transportation for life, or for not less than fifteen years, or by imprisonment not exceeding three years; and

Attempting to poison is in like manner felony, and is made subject to the same punishments.

Sending explosive substances.—Persons guilty of so doing, with intent to do bodily harm to any other person, are guilty of felony, and liable to be transported for life, or to imprisonment.—7 *Will.* 4 & 1 *Vict.* c. 85, *s.* 5.

Throwing corrosive fluid, with the like intent, is also in like manner punishable with transportation, or imprisonment, at the discretion of the court.

The stat. of 7 *Will.* 4 & 1 *Vict. c.* 85, makes it a crime of felony, punishable with death, when any person wilfully and maliciously *stabs or cuts* another with *intent to murder*, rob, maim, disfigure, or disable him, if such acts were committed under such circumstances as would have constituted the crime of murder if death had ensued.

The same statute also makes it a similar offence under the same circumstances, to present or level at any one any kind of loaded arms, and attempt to discharge the same by drawing the trigger, or in any other manner, with intent to murder, rob, &c. and all counsellors, aiders, and abettors.

In these cases, a voluntary act the law judges to be done out of malice: as where one kills a person without provocation.

If a man maimed or disabled himself, it was said that he might be indicted and fined for it at the king's suit.

Assaulting magistrates and officers in the preservation of wrecks, is a misdemeanour and punishable with transportation for seven years or imprisonment.—9 *Geo.* 4, c. 31.

Impeding persons escaping from wrecks, although by no means a common crime, is yet included in the statute book, and punished with transportation and imprisonment.—7 *Will.* 4 & 1 *Vict.* c. 89.

Assaulting Peace and Revenue Officers; assaults with intent to commit felony, or in pursuance of a conspiracy to raise wages, compulsory forcing of seamen on shore,

assaulting deer-keepers, assaulting gamekeepers, are also severally made punishable by various acts of parliament passed in the 9th year of *Geo.* 4.

By the 3rd & 4th *Will.* 4, c. 53, persons assaulting custom-house and excise officers in the execution of their duty, are guilty of misdemeanours, and may be transported or imprisoned.

Abduction of women on account of their fortunes, or of children under the age of sixteen years against the consent of their parents, renders the offender liable to indictment for misdemeanour, and to punishment by fine and imprisonment, or both.—9 *Geo.* 4, c. 31.

It is no legal excuse that a defendant made use of no other means than the blandishments of a lover to induce a child under sixteen years of age to elope with him.—*R.* v. *Twisleton*, 1 *Lev.* 257.

Stealing Children under ten years is felony by 9 *Geo.* 4, c. 31, and made punishable by transportation for seven years or imprisonment.

Ravishing Women constitutes the crime of *Rape*, and is where a man hath an unlawful and carnal knowledge of a woman by force and against her will, which offence is felony, both by the common and statute law, and is punished by death.

It is enacted by the 9 *Geo.* 4, c. 31, that whosoever shall carnally know any woman child under ten years of age, he shall suffer death as a felon; and here it doth not signify whether such child consented or were forced; but it must be proved that the offender entered her body.

To carnally know a child above ten and under twelve years of age even with her consent is a misdemeanour, and punishable by imprisonment either with or without hard labour.—9 *Geo.* 4, c. 31, s. 17.

In case of a rape committed, it is no excuse or mitigation of the ravisher's offence that the woman at last yielded to the violence, and consented, either after the act or before, if such her consent was forced by fear of death or imprisonment.

Or that a woman was a common strumpet, who is nevertheless under the protection of the law, and may be injured in her body.

But it is said by some authors to be evidence of a woman's consent that she was a common whore.

And it is a strong presumption against any woman that she made no complaint in a reasonable time after the injury, for which our ancient laws mention forty days.

If she conceals the fact for any long time, it may argue a consent.—*Hawk. P. C.* 108.

A woman ravished may prosecute, and is allowed to be witness in her own case, but the woman's positive oath of a rape, without concurring circumstances of the fact, and signs of injury received, is seldom credited.

Because, says *Hale*, there are divers instances of rapes that have been fully proved, but were afterwards discovered to be malicious contrivances.—*Hale's P. C.* 635, 636.

If a man can prove an *alibi*, as that he was at another place, or in another company, at the time she charges him with the offence, this will invalidate her oath; so it is if she be wrong in the description of the place where done.

Or when she swears the fact to be committed where it was impossible he could have access at that time, as if the room was locked up and the key in the keeping of another person, &c.—12 *Vin. Abr.* 247.

The aiders and abettors in committing a rape are considered as principals.

In Lord Audley's case, he was indicted and executed for assisting a servant in ravishing his own wife, and she at the trial was admitted as a witness against him.

Anciently rape was punished by the loss of eyes and privy members, the offending parts.

The crime of *Buggery* or *Sodomy* is a carnal copulation against nature: as of a man with a man, or man or woman with a brute beast.

It is said, that formerly this vile and horrible offence was punished with burning or burying alive; it is now felony by statute, in the agent and all that are present aiding or abetting.

Also in the patient consenting, if he be within the age of discretion.

Persons that attempt to commit this crime undergo a severe punishment of the pillory, &c.

Fortescue is of opinion that this crime committed by a man on a woman is felony.—*Fortes. Rep.* 91.

Assaults with intent to commit either of the two last mentioned offences, are misdemeanours, and are punishable with imprisonment with or without hard labour, and prisoner to find sureties to keep the peace.

Robbery with violence.]—Whoever robs any person, and at the time of or immediately before such robbery,

shall stab, cut, or wound such person, he shall be guilty of felony, and being convicted thereof, shall suffer death. —7 *Will.* 4 & 1 *Vic.* c. 87.

But judgment of death may be recorded, 4 *Geo.* 4, c. 48, or the sentence may be commuted to transportation.

Robbery by persons armed, and robbery attended by threats of violence, are also included in the above statutes.

Robbery consists in the felonious and forcible taking from the person of another, or in his presence against his will, property of any value, by violence or putting him in bodily fear.—4 *Black. Com.* 243.

And the prosecutor must actually prove that he was in bodily fear, or such circumstances as the court and jury may presume an apprehension of danger.—*Fost. P. C.* 128.

If a man knock another down and take his property while he is insensible on the ground, it is robbery.—*Fost.* 128.

If one man takes another's child, and threaten to destroy it, unless the other gives him money, it is robbery.—2 *East, P. C.* 735.

And if any thing is taken from another's person, without putting in fear, which distinguishes this crime, it is properly no robbery, but felony.—3 *Inst.* c. 16.

There is both a taking in deed, being the very act; and in law, as where a robber compels a man for fear of death to swear he will bring him a sum of money, which he delivers to the other; this is a taking and robbery.

If a robber bids a person on the highway deliver his money, though it be either with or without weapon drawn, and the person gives it him, it is a felonious taking to make this crime.

And where one with a pistol in his hand, demands money of another, if afterwards he prays alms, and the same being given accordingly, it is a robbery; being accompanied with circumstances of terror, that cause the person to part with his money.—*Hawk. P. C.* 96.

A man pursued by a highwayman, endeavours to make his escape, but lets fall his purse, &c., which the robber takes up, this is taking from his person.

It is the same, though in striving he lets the bag or purse fall again, and leaves it there; or if finding little therein, he delivers it with all the money again to the party: because the offender had the thing in his possession, and continuance is not required.—*Hale's Sum.* 72.

To take goods from a servant, in sight of his master, is adjudged a robbery of the master; and taking away a person's horse standing by him, or of any thing belonging to him, in his presence, and against his will, is robbery.

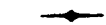
For the taking a thing in the presence, is in law a taking from the person.

But if one leaves his horse tied to a gate, and steps aside; or if a carrier follows his horses at a distance, and they are taken away, this is not such a taking to be robbery.

All that come in company to rob, being in the same highway, are principals, although one only actually do it; and though he rides away from the rest of the

gang, and commits the robbery without their knowledge.

Every one shall be esteemed to take the money, because they came together with an intent to rob some person, and to assist each other.



SECT. 3.—*Offences against Property.*

Larceny, from the French word *larrecin*, is the wrongful taking and carrying away the personal goods of another, with a felonious intent to convert them to the use of the offender, without consent of the owner.

This offence was formerly divided into grand and petit larceny, which was a distinction made as to the value of the property stolen, but this distinction was abolished by the 8 Geo. 4, c. 29.

The punishment for this crime depends much upon its magnitude, transportation or imprisonment of various terms being inflicted; and if an offender is already under sentence of transportation, &c. for one larceny, the Court may award transportation or imprisonment for every subsequent offence, commencing at the expiration of the former sentence.—*7 & 8 Geo. 4, c. 28.*

Formerly there could be no larceny of any other than *personal* goods at common law.— 1 *Hale*, 510.

And therefore the severing and stealing at the same time, of grass, wood, iron, &c. attached to the freehold, was merely a trespass.

But now by various statutes these several offences

are taken notice of as criminal acts, and made punishable in like manner as other larcenies.

No larceny at common law can be committed of animals *feræ naturæ*, as deer and hares, or wild fowl and rooks.

Yet if they are reclaimed, and may serve for food, it is otherwise.

All valuable domestic animals, as horses, dogs, &c. *domitæ naturæ*, may be the subject of larceny; so also are fowls and poultry generally.

The taking and carrying away of the goods must be felonious, and done *animo furandi.*—4 *Bl. Com.* 232; but this is a matter for the jury to determine.

A man stealing goods, and taking a horse from a field, not with the intention of stealing it, but to get off with stolen property, was held not to have stolen the horse.—*R.* v. *Crump*, 1 *Carr. & P.* 658.

If a man lose goods, and another finds them, and not knowing the owner, converts them to his own use, it is not larceny.—3 *Inst.* 108.

But it is otherwise if the finder knows the owner; as where a carpenter is entrusted with a beaureau to mend, finds money therein, and keeps it for his own use, it was held to be larceny.—2 *Leach*, 952.

Not only if one steal the goods of another, it is felony; but if a third person feloniously takes them from him, such third person is a felon as to both the others.

Stealing of goods, which persons by contract are to use; or where a guest steals plate set before him at an inn or tavern; either of these are felony; those that have the charge of things, as of a chamber, &c., may be also guilty of larceny.

In case a shopkeeper delivers goods to one, who pre-

tends to buy them, and he runs away with the things, it is felony: but if a horse be lent to a man to go to a certain place, he goes further, and then rides away with the horse, it is not larceny, because he had at first a lawful possession.

Yet it is held to be felony, if a jury find that the party, at the time of hiring, intended to convert the horse to his own use.

So when the possession of property is obtained by any contrivance *animo furandi.—Leach's C. L.* 189, 206, 329.

So where a coachman opens and embezzles a parcel left in a hackney coach.—*Leach's C. L.* 320.

If a carrier, after he has brought goods to the place appointed, take them away privately, it is felony; for the possession which he had from the owner being determined, he is a mere stranger. It is the same if he carry the things to some other place than that agreed.

Where a tailor employed to make a suit of clothes embezzles the cloth delivered to him for that purpose, it is no felony: nor is it so where a servant goes away with his master's goods, delivered to him, which is only breach of trust.

This is by reason of the delivery; and the possession not being acquired *animo furandi.*

A married woman cannot be guilty of felony in stealing her husband's goods; though if she deliver them to an adulterer, it is felony in him to receive them.

And if a feme covert commit felony in company with her husband, it shall be presumed to be done by his command and coercion, and she will be excused.

But it is otherwise where the wife steals goods alone

without the knowledge of the husband; then it is felony in her.

In felonious attempts, the least removing a thing, although it be not quite carried off, is felony; as where one takes things out of a box, and lays them on the floor, but is apprehended before he gets away, &c.—*Hale's Sum.* 64.

To steal cats, which are of base nature, is not felony.

Burglary, from the Latin words *burgi latrocinium*, is where a person in the night time breaks and enters into the mansion-house of another, to the intent to commit felony within the same.

The hour must be specified therefore; and the rule is now, as established by statute of 7 *Will.* 4 & 1 *Vict.* c. 86, that the fact must appear to have been committed between nine o'clock in the evening and six o'clock in the morning.

To constitute a breaking, the entrance must be obtained either by fraud, conspiracy, threats, or force; there must be an actual entry either of the person of the thief, or some instrument by which the felony is to be committed; and the entry must be with a felonious intent. And it is burglary whether the felonious intention be executed or not.

One of the servants in a house opened his lady's chamber door (which was fastened with a brass bolt) with *design* to commit a rape: and King, Chief Justice of the Common Pleas, ruled it to be burglary, and defendant was convicted and transported.—*Str.* 481. See *Kel.* 30, 67; *Hut.* 20, 33; *Hale's P. C.* 83, 562.

The like offence committed by day is called *Housebreaking*, to distinguish it from burglary.

Burglary may be committed in a mansion-house, though all persons are out upon occasion: so if a man hath two houses, and lives sometimes in one, and sometimes in the other; but if the house he does not inhabit is broken by any person in the night, it is burglary.

A shop and out-buildings adjoining are parcel of a house; and chambers in an inn of court; or where part of the house is divided from the rest, with a door to the street: either of these are mansions; and it is burglary to break them.—*Hale's P. C.* 82, 83.

In some cases there may be burglary without actual breaking a house; as where thieves pretend business to get in by night, and the owner of the house opens his door, and then they come in and rob the house, this will be burglary in the offenders.

If a criminal doth not break the house, but is within and steals goods, and after opens the house on the inside, and goes out with the goods; or if one comes down a chimney to rob the house, &c., it will be burglary.

Where a person unlocks any door, or gets into any house by the help of a key, or breaks the glass of windows, or makes a hole in the wall, &c., in order to steal, it is a breaking of the house.

And setting a foot over the threshold, putting a hand, hook, or pistol, within the window or door, is an entry in law to make it burglary.

But a distinction has been made between cases where the instrument which entered, was for the purpose of breaking only, and not of taking the property.—2 *East's P. C.* c. 15, s. 7.

But if a door be open, or hole made in the wall be-

fore, and the thief enters and steals, or draws out goods, this is not burglary by the common law.

In case a servant draws the latch of his master's chamber in the night to rob him, it is a breaking; and if he opens the window to let in a thief, who comes in and takes things, it is burglary in the stranger, and robbery in both.—*Hale's P. C.* 553; 2 *Str.* 881.

Receivers of Stolen Goods.]—By the 7 & 8 *Geo.* 4, c. 29, persons receiving any chattel, money, valuable security, or other property, the stealing or taking whereof shall amount to a felony, such persons knowing the same to have been stolen, shall be guilty of felony.

They may be indicted either as accessories after the fact, or for substantive felonies.

The guilty knowledge required by the statute is proved sometimes by the mouth of the original felon, (who may be examined as a witness for that purpose,) or it may be inferred from other circumstances, such as that the receiver bought them greatly under value.—1 *Hale,* 619.

It is competent to the defendant to disprove guilt in the principal felon.—*Fost.* 365.

An owner prosecuting a receiver or thief to conviction is entitled to restitution of his property, except in cases of negociable instruments transferred for valuable consideration.

Punishment, transportation or imprisonment, with or without solitary confinement.

Embezzlement is distinguished from larceny by the fact of the party defendant having received money or goods in the first instance by virtue of his employment,

and then feloniously appropriating the same to his own use.

Such are the instances of servants, both public and private, receiving monies and not accounting for them to their employers.

A tradesman, however, who receives goods in the common course of business, to be made up, or mended, and instead of doing so sells them, does not commit the offence of embezzlement, but merely a breach of trust.

Embezzlements by clerks and servants is provided for by the 7 & 8 *Geo.* 4, c. 29; those committed by public servants are also made punishable by various other statutes.

This offence is declared to be larceny, and is punishable with transportation in some instances, and in others with imprisonment.

Cheating and obtaining goods by *false pretences* are constituted misdemeanors, under the 7 & 8 *Geo.* 4, c. 29, and are punishable with transportation and imprisonment.

Until this statute had passed, a failure of justice frequently arose from the subtle distinctions which existed between larceny and fraud.

Arson is the crime of maliciously setting fire to and burning any buildings or property.

And in order to constitute it an offence under the statutes relating to this crime, it must appear that the burning was done wilfully and maliciously, because without it there would be no offence, either at common law or by statute.

Lord Hale says, if any person, although he might be

unqualified, were to shoot with a gun, and in so doing were to set fire to the thatch of a house, yet it would not amount to a felony.—1 *Hale*, 569.

If A. intending to set fire to the house of B. accidentally fires another person's house, yet it would be felony in A.—1 *Hale*, 569.

It is seldom that the wilfulness of the burning is proved directly, the jury in general have to draw their own inferences from the defendant's conduct.

It is not necessary that the building or property should be actually consumed, the destruction of any part of the buildings or stacks, &c. described in the indictment is sufficient.—1 *Hawk.* c. 39.

The last statute relating to this crime is 7 *Will.* 4 & 1 *Vict.* c. 89, which is much more comprehensive than any of the previous statutes.

The setting fire to plantations, growing crops of corn, &c. is also a felony, and punishable with transportation or imprisonment.

Malicious Mischief.]—If any person unlawfully and maliciously cuts, breaks, destroys or damages any silk, woollen, cotton, &c. in the loom, or any looms, machines or engines for making the same, he is guilty of felony, and being convicted thereof is rendered liable to transportation for life, or not less than seven years.—7 & 8 *Geo.* 4, c. 30.

Drowning Mines, and other injuries to mining property, are made punishable by various sections of the act last referred to.

Exhibiting False Signals, with intent to bring vessels

into danger, is a capital felony by the 7 *Will.* 4 & 1 *Vict.* c. 89.

Destroying Hop Binds maliciously, renders the offender liable to transportation or imprisonment, as the court shall think fit.—7 & 8 *Geo.* 4, c. 30.

Destroying Trees.—By the same statute, persons convicted of cutting, breaking, barking, rooting up or destroying trees, where the damage sustained exceeds the sum of one pound, are guilty of felony, and made liable to transportation and imprisonment.

Forgery.]—Until a very recent period this crime was punishable with death, but by the 7 *Will.* 4 & 1 *Vict.* c. 84, the capital punishment has been abolished, and transportation substituted for it.

The altering a part of a genuine instrument with intent to defraud, is a forgery.—*R.* v. *Teague*, 2 *East*, *P. C.* 979.

And whether the name forged be that of a fictitious person, who never existed, or of a person actually existing, it is equally a forgery.—*R.* v. *Lewis*, *Foster*, 116.

But if a man has been known a long time by a fictitious name, and draws a bill in that name, it will not be a forgery.—*R.* v. *Aickles*, 2 *East*, *P. C.* 968.

The party whose name is forged is a good witness to prove the forgery.—9 *Geo.* 4, c. 32, s. 2.

If several persons unitedly execute and make a forged instrument by severally performing a distinct part, they are all guilty as principals.—*R.* v. *Bingley*, *R.* & *R.* 446.

It is not necessary to prove that any person has been actually defrauded by the forgery.—*R.* v. *Cooke*, 2 *Strange*, 291.

If a jury are satisfied that the prisoner uttered a forged instrument as true, meaning it to be taken as such, they are bound to infer an intent to defraud.—*R.* v. *Hill*, 8 *C. & P.* 274.

The present punishment for forgery is transportation or imprisonment, at the discretion of the court.—*7 Will.* 4 *&* 1 *Vict.* c. 84.

SECT. 4.—*Offences against Public Justice.*

Perjury.]—Persons guilty of committing wilful and corrupt perjury, or subornation of perjury, are liable to transportation or imprisonment.—*2 Geo.* 2, c. 25.

Formerly the offender, when convicted, was made to stand in the pillory, as part of the punishment, but now standing in the pillory has been abolished as a punishment, by the 7 *Will.* 4 *&* 1 *Vict.* c. 23.

Sometimes prosecutions for perjury are directed by the judge against witnesses, examined upon trials at nisi prius or general gaol delivery, when there appears to be good cause for such a prosecution.—See the 23 *Geo.* 2, c. xl.

There are several requisites in law which required to be sustained in prosecutions for perjury; ex. gratiâ, the perjury must be by reason of an oath taken in some judicial proceeding.—*5 Mod.* 348.

The oath must be taken before a competent jurisdiction, for if it is taken before a person not having lawful authority to administer it, then no perjury can be assigned upon it.—*3 Inst.* 165.

The part of the evidence upon which the perjury is

assigned must be material to the matter under consideration.—*R.* v. *Nichol*, 1 *B.* & *Ald.* 21.

The oath or answer given must be false in fact.—1 *Hawk.* c. 69.

And lastly, the false oath must be taken deliberately and intentionally; if done from inadvertence or mistake, it does not amount to perjury.—1 *Hawk.* c. 69.

Bribing Constables is punishable with fine and imprisonment, and that also whether the bribe is accepted or not.—3 *Inst.* 147.

Receiving bribes at elections, municipal and parliamentary, is also punishable with fine and imprisonment under various statutes.

Misconduct of Officers of Justice.—Every malfeasance or culpable nonfeasance of an officer of justice, with relation to his office, is a misdemeanor at common law, and is made punishable with fine and imprisonment.—*Cro. El.* 654.

Compounding Felonies is a very great misdemeanor in the eye of the law, on account of its manifest effect to subvert public justice; it is made punishable with fine and imprisonment, or both.—1 *Hawk.* c. 59.

By the 18 *Eliz.* c. 5, the compounding informations on penal statutes is also made a misdemeanor.

Fraudulent Bankruptcy is an offence cognizant to our laws, and a bankrupt may be indicted as a felon for refusing to surrender himself, after notice in the Gazette; and being convicted thereof, is liable to transportation or imprisonment. — 6 *Geo.* 4, c. 16, s. 112.

The same punishment may be also awarded against a bankrupt for not discovering his property.

Returning from Transportation.—Offenders returning from transportation are liable to be transported for life. —*4 & 5 Will. 4*, c. 67.

And persons discovering offenders of this description are entitled to a reward of *20l.*, by *5 Geo. 4*, c. 84, s. 22.

Very frequently, in cases of this description, the identity of the party is the only issue which is difficult of proof. The defendant, if at large before his time, must show, if he can, that he is justified in so being, by a commutation of his sentence or pardon.

Rescue of Prisoners.]—By the *1 & 2 Geo. 4*, c. 88, persons rescuing, or aiding and assisting in the rescue of individuals charged with felony, or in custody on suspicion of felony, are made liable to transportation or imprisonment.

Misprisions are those class of offences which are neither negative or positive, but which tend greatly to the interference with public justice; they consist of the concealment of felonies and treasons which ought to be revealed.

Sect. 5.—*Offences against the Public Peace and Religion.*

Riot.]—The *3 Geo. 4*, c. 114, inflicts the punishment of imprisonment and hard labour for this offence, which

may also be attended by fine, at the pleasure of the court.

It must appear that three persons at least are present, to constitute a riot.—2 *Hawk.* c. 47.

It must also be proved that the three or more persons were assembled together under such circumstances as were calculated to excite terror in the minds of other people.—*R.* v. *Hughes*, 4 *C. & P.* 372.

It is not necessary that the Riot Act should be read to constitute a riot.

The effect of the proclamation being read is to make those persons guilty of felony who do not disperse within one hour after it has been so read.—*R.* v. *Furzey*, 6 *C. & P.* 81.

Riotously demolishing or beginning to demolish any houses, chapels, or other buildings is of the highest class of felonies; and the punishment was death under the 7 & 8 *Geo.* 4, cap. 30.

Under this act of parliament the jury must be satisfied of the intention of the rioters to pull down the house or building in question; an intention merely to do some injury, and then to go away, is insufficient.—*R.* v. *Thomas*, 4 *C. & P.* 237.

An Affray is a quarrelling and fighting between two or more persons in the public streets or highways; and for which the offenders may be visited with fine or imprisonment, or both.

If the fighting is in private it does not constitute an affray within the legal meaning of the term; and no threatening or quarrelsome words will in themselves amount to an affray.—1 *Hawk.* c. 63, s. 1.

Forcible Entry upon a Freehold is another description of breach of the public peace specially taken notice of and guarded against by the statute of *5 Rich. 2*, cap. 8, and is also, in like manner with the last-named offence, punished with fine and imprisonment.

To constitute the forcible entry, actual violence must be shown to have been used, such as breaking of windows, doors, &c.—1 *Hawk.* 64.

An entry by an open window, or by trick or artifice practised on the owner, is not sufficient.—1 *Hawk.* 64.

There must be such force, or such a show of force, as is calculated to prevent resistance.—*R.* v. *Smyth*, 5 *C. & P.* 201.

Challenging to Fight, or sending challenges, are alike breaches of the public peace, and are generally severely dealt with. This, like many other offences at common law, is punished with fine and imprisonment.

Threatening Letters are specially provided for by statute *7 & 8 Geo. 4*, c. 29, and the sending them is thereby declared to be felony, and subjects the offender to transportation and imprisonment.

Dropping such a letter in a place where the prosecutor would pick it up, is a sending within the meaning of the act.—*R.* v. *Lloyd*, 2 *E. P. C.* 1123.

Libel.—The malicious defamation of any person, made public by printing, pictures, &c. in order to provoke him to wrath, or to expose him to public hatred or contempt, is a libel, and indictable as such at common law.

Wherever an action will lie for a libel without special damage averred, an indictment will also lie.—*Arch. Cr. Pl.*

Writings vilifying the characters of deceased persons are punishable as libels, and may be made the subject of indictment.—*5 Co.* 125 a.

So also are writings which tend to degrade foreign potentates, when they have a tendency to interrupt pacific relations between this country and the foreign power.—*R.* v. *Peltier*, *How. St. Trials.*

And libels directed against bodies of men, without mentioning particular individuals, are also punishable by the criminal law.

A defendant cannot set up the truth of a libel as an excuse for it, and as a defence to an indictment.—*5 Co.* 125; 1 *Hawk.* cap. 73.

Hanging Individuals in Effigy is the same description of offence as the last, and therefore punishable in like manner by indictment.

Blasphemous Libels.]—The 9 & 10 *Will.* 3, c. 32, was passed for the protection of the Christian religion from the dangerous tendency of blasphemous libels, and makes the offence of their publication punishable with imprisonment.

Swearing and Cursing.]—For this offence persons are liable to be fined, and in default of payment of the fine to be imprisoned.

Disturbing Public Worship.]—Persons wilfully, maliciously, or contemptuously disturbing any meeting or

congregation of persons assembled for the purposes of religious worship, may be bound over by recognizance to appear at the general quarter sessions of the peace, and upon conviction may be fined 40*l.*

The statute extends to foreign Lutherans as well as other congregations.—*5 Peake*, 132.

And a disturbance arising out of a contest for the situation of a clerk, &c. is a disturbance within the meaning of the statute.—*S. C.*

Arresting a Clergyman going to perform Divine Service, or during the time when the service is actually performing, renders the party liable to punishment for a misdemeanor, with fine and imprisonment, or both, as the court shall award.—9 *Geo.* 4, cap. 31, sec. 23.

Sacrilege.]—To break and enter, or steal property of any description in any church or chapel, is felony, and may be punished with transportation for life or for any term of years not less than seven.

The chapels mentioned do not apply to the meeting-houses of dissenters, but the protection of the statute seems to be confined to chapels of the Church of England.—*R.* v. *Warren*, 6 *C. & P.* 335.

Bigamy, in more legal phraseology termed polygamy, is the marriage of a man to a woman during the life-time of a former wife, or *vice versâ;* and is made a felony by stat. 9 *Geo.* 4, cap. 31, sec. 22.

The party committing this offence must either be indicted in the county where it was committed, or where he is apprehended upon the charge.

The punishment for bigamy is transportation for

seven years, or imprisonment with or without hard labour not exceeding two years.

Whether the former marriage was celebrated in England or abroad is immaterial.—1 *Hale*, 692.

But it must have been celebrated according to the laws of the foreign country where it was solemnized.

SECT. 6.—*Offences against Trade, the public Police, &c.*

Smuggling.]—Under this title there are several classes of offences provided for by various statutes, and made punishable thereby in several ways.

Where the offences are committed on the high seas, the offenders may be brought to trial in any county where they are found or brought on shore.

The principal offences enumerated in those statutes which have been passed for the prevention of smuggling are,—making signals to smuggling vessels, 3 & 4 *Will.* 4, cap. 53, sec. 122,—being armed and assembled for the purpose of assisting in running smuggled goods, same statute,—shooting at vessels belonging to the royal navy,—being in company with others with prohibited goods,—being found armed near to navigable river.

All of which are declared to be felonies, and are punishable with transportation or imprisonment.

Forestalling is still an offence punishable at common law,—1 *East*, 143,—and signifies the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing

their goods or provisions there, or persuading them to enhance the price when there.

This offence was formerly prohibited by statute *5 & 6 Edw.* 6, cap. 14, but that statute was afterwards repealed.

Regrating is the buying of corn or other victual in any market, and selling it again in the same market or in any other market within four miles thereof.

This is also an offence indictable at common law, although not so by any statute.

Engrossing, which is another of the same description of offences, against public trade, as the two last, is punishable as the former, viz. with fine and imprisonment.

Engrossing consists of the getting into one's possession, or the buying up of corn or other dead victual, with intent to sell it again.—*R.* v. *Waddington*, 1 *East*, 167.

Common Nuisance.]—Persons are indictable at common law, and punishable by fine or imprisonment, who carry on offensive trades in places where they will be detrimental to the health or comfort of the public.

As for using a shop, in any public market, as an open and exposed slaughter house; for erecting a hartshorn manufactory in the middle of a town; for keeping hogs in a public street, and feeding them with offal.

So also the keeping a ferocious bull in a field through which there is a public footpath; or a ferocious dog unmuzzled, and allowing it to wander about, are nuisances, and indictable as such.

The negligent use of furnaces employed in working steam engines is made punishable by statute *2 Geo. 4, c. 41.*

In cases of offensive trades being carried on, it is not necessary that, when indicted, it should be proved that such trade is injurious to the health of the inhabitants living near, it is quite sufficient to show that it is offensive to the senses.—*R.* v. *Neil, 2 C. & P. 485.*

Gaming-houses and Brothels are of the worst description of public nuisances; and persons acting or behaving as the master or mistress thereof, are deemed in law to be the keepers, and liable to be prosecuted and punished as such, either at the general quarter sessions of the peace, or at the assizes; *25 Geo. 2, c. 36, s. 8.*

The indictment for these offences cannot be removed by certiorari, unless upon the part of the crown.

Where an indictment has been preferred by a private prosecutor, the court will allow any other person to go on with it, even against the consent of the first prosecutor.—*R.* v. *Wood, 3 B. & Ad. 657.*

Obstructing common Highways.]—Another description of public nuisance is the obstructing of highways, either by erecting gates across them, placing carts thereon for the sale of vegetables, &c.; laying soil, or digging holes there; stopping a water-course, whereby a highway is overflown; exhibiting effigies at a window, and thereby attracting a crowd; all of which offences are punishable by fine and imprisonment.

Offences relating to Game are, in some instances, and under various acts of parliament, made punishable

under summary proceedings, and conviction before magistrates; see 9 *Geo.* 4, c. 69.

Taking game by night, after two previous convictions, renders an offender liable to transportation for seven years, or to imprisonment not exceeding two years—9 *Geo.* 4, c. 69.

For the purposes of the game acts, "night" signifies the time between the first hour after sunset, and the first hour before sunrise.

And game includes hares, partridges, pheasants, grouse, heath or moor game, black game, and bustards; rabbits are also mentioned in various sections of the acts relating to the game laws.

Three or more persons entering land, open or enclosed, at night-time, and armed with offensive weapons, for the purpose of destroying game, is a high misdemeanor, subjecting the offender to transportation, or imprisonment and hard labour—9 *Geo.* 4, c. 69. This offence is not cognizable at sessions.

The intent of the parties is proved by circumstances of their having game, or game bags, upon their persons, &c.

Offensive weapons, it is said, may consist of large stones, *R.* v. *Grice*, 7 *C.* & *P.* 803, also of sticks and bludgeons; but mere switches, for the purpose of beating bushes, are not offensive weapons.

If one of the party is armed with a gun, or offensive weapon, all his companions are equally liable with himself.

The offence must have been committed within twelve calendar months of the prosecution.

Setting Spring Guns.]—The use of spring guns having

dictment charges him with conspiring together with others not appearing, or who are dead.—*R.* v. *Nicholls*, *2 Stra.* 1227.

Fine or imprisonment, and sometimes both, are the punishments inflicted after conviction of conspiracy.

CHAPTER V.

VARIOUS DESCRIPTIONS OF ESTATES, REAL AND PERSONAL.

SECT. 1.—*Various Descriptions of Estates.*

ALL Property is divided into Real or Personal Estate.

The former consists of such things as are permanent, fixed, and immovable, which cannot be carried out of their place: such as lands, houses, &c.

Things *real* consist of lands, tenements, and hereditaments.

Land comprehends every thing of a permanent nature, substantial and irremovable, and is a word of very extensive signification.

Tenement is a word of still greater extent; and although in its vulgar acceptation it is only applied to houses and buildings, yet in its legal sense it signifies every thing which may be holden, whether of a substantial or ideal nature.

Thus lands and houses are tenements, and in like manner advowsons, rights of common, peerages, fran-

chises, and offices, are equally and legally entitled to the description of tenement.

But a *Hereditament*, according to Sir Edward Coke, is the largest of all expressions denoting property, for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed.

Thus an heir-loom, implement of furniture, which by custom descends to the heir, together with a house, being inheritable, is comprised in the word hereditament.

Again, hereditaments are of two descriptions, viz. corporeal and incorporeal.

Corporeal hereditaments consist wholly of substantial and permanent objects, all of which may be comprehended under the general description of land.

For land comprehends any ground, soil, or earth whatsoever: as arable land, meadows, pastures, woods, moors, waters, marshes, &c.

It also legally includes all castles, houses, or buildings, because land is the structure or foundation; and if land or ground is conveyed, the structure or building passes therewith.—*2 Bl. Com. c. 2.*

If a man grants his lands, he grants all mines of metals, woods, waters, and houses therein and thereupon.

Incorporeal hereditaments are rights issuing out of things corporeal, whether real or personal, or concerning, annexed to, or exercisable within the same.

Incorporeal hereditaments are principally of ten

sorts, viz. advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

An *Advowson* is the right of presentation to a church or ecclesiastical benefice, and is technically termed either advowson appendant or advowson in gross.

Tithes are the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants.

And tithes consist of corn, grass, hops, &c. which are termed prædial tithes; wool, milk, pigs, &c. which are known as mixed tithes; and there are also personal tithes, consisting of things arising from manual occupation, as trades, fisheries, &c.

Common of Pasture, which is another incorporeal hereditament, is the profit which a man hath in the land of another to feed his beasts.

Again, there is also a common of *piscary* and common of *turbary;* the former being a liberty of fishing in another man's pond or river; and the latter is the right of cutting or digging turf upon another's ground.

Common of Estovers is another right of the same description, and consists in the liberty of taking necessary wood for the use or furniture of a house or farm from another person's estate.

The other descriptions of incorporeal hereditaments may be easily understood from their respective names.

Personal Estate consists of goods, money, plate, furniture, and all other movables which may attend the owner's person wherever he thinks proper to go.

Property in chattels personal is of two descriptions, viz. that which is actually in the owner's possession; and secondly, that to which he is entitled by action, but of which he is not in the actual enjoyment, possessing only the mere right thereto.

Property in possession consists of jewels, money, implements, garments, vegetables when severed from the ground, animals, machines, &c.

The other description of personal property is that which is technically termed a *chose in action*.

Thus money due upon a bond or bill of exchange is a chose in action, for there is no possession of the money until paid or recovered by law.

All property which depends upon contracts, express or implied, and which may be enforced in a court of law, may be termed choses in action.

SECT. 2.—*Rules relating to the Tenure of Real Estates.*

The *Fee-Simple* estate, is where a man hath lands or tenements of inheritance, to hold to him and his heirs for ever.

An estate in fee-simple is such as is held without limitation to what heirs, but to heirs generally; it is the word heirs makes the inheritance, and a person cannot have a greater estate.

Where land is granted by deed, to hold to one for

ever, or if it be to him and his assigns for ever, this is no fee-simple, but an estate for life only, because the word "heirs" is wanting.

Yet in case of a will, which is more favoured in law than a grant, the fee-simple and inheritance may pass without this word *heirs*, or other words of perpetuity, where the intention of the testator to convey the whole interest is manifest.

If a gift be made of lands to a person and his children, and their heirs, it is a fee-simple jointly to all that are alive; and if an annuity be granted to one and his heirs, it is a fee-simple *personal*.

At common law, *all estates* of inheritance, it is said, were fee-simple, and all other estates are derived out of it; for which reason there must always be a fee-simple at last in somebody.

Estates in Fee have been generally divided in *fee absolute*, otherwise termed the *fee-simple*, and fee *conditional*, otherwise called *fee-tail*.

He who is seised of lands in fee-simple, may give, grant, or charge the same, as he pleases, by deed or will: but he that has an estate-tail only cannot do so.

The *Fee-tail* estate, is an estate of inheritance whereof a person is seised to him and the heirs of his body, begotten or to be begotten.

It is a limited estate or fee, opposed to that of fee-simple; and there must be not only the word *heirs* in the deed which creates it, but also the word *body*, for it is that makes the estate-tail, without which it may be a fee-simple estate.

Fee-tail, is either a *general tail*, where lands or tene-

ments are given to a man and the heirs of his body begotten; or to a woman and the heirs of her body begotten.

In which case it is called *general tail*, because how many wives soever a person who holds by this title shall have in lawful marriage, his issue by them severally are all capable of inheriting in their turns.

And if the woman has several husbands, and hath children or issue by every one of them, they may inherit after each other as heirs of her body.

Or it is a *tail special*, when lands are limited to a man and his wife, and the heirs of their two bodies begotten; and it is termed special tail, by reason that no other persons can inherit the lands but the issues that are begotten on that particular wife.

When lands are given to a husband and wife, and to the heirs of the body of the husband, he has an estate in general tail, and the wife an estate only for life.

This is because the word *heirs* hath relation in general on the husband's body.

And if an estate be limited to a man's heirs that he shall beget on the body of his wife, though it creates a special tail in the husband, the wife in that case will be entitled to nothing.

If a gift be to persons unmarried, or to a married man and another's wife, and the heirs of their bodies, it may be a good estate in special tail, if they afterwards marry.

There is an estate-tail within the equity of the stat. of Westm. 2, where lands are granted to a person and his heirs male or female of his body begotten; in which case the male or female issue shall only inherit, pursuant to the limitation.

If here the estate be limited to heirs male of the body, the pedigree must descend by heirs male; and on the other hand, if it be to heirs female, the title must be derived by heirs female one after another.

So that where a grant is made to a person, and the heirs male of his body, and he has issue a daughter, who hath a son, and then dies, such son may not inherit the estate, because he cannot make his descent by heirs male.

A lease for years may not be intailed; if it be made to a man and the heirs of his body, it is void; for a chattel cannot be turned into an inheritance; yet it may be assigned in trust to permit the issue in tail to receive the profits of the land; and that in effect is an estate-tail.

It is incident to the estate of tenant in tail, to be dispunishable of waste; such tenant might formerly have levied a fine to bar his issues, &c. or suffered a recovery; he may grant leases for twenty-one years, or three lives, according to the stat. *32 Hen.* 8, c. 36, and by custom grant copyhold lands, &c.

He cannot in any other manner grant or convey a greater estate than for his own life; or give away the land by will, &c.

Entails are usually created upon marriage settlements, where the lands are settled on the husband for life, then to the wife for her life, and to their issue in remainder.

And if tenant in tail, general or special, die without issue, so as there is no heir to take according to the limitations, the donor or his heirs may enter as in reversion.

Or the land shall descend to such person as is limited to have it after the estate tail is spent.

The *Estate-tail after Possibility of Issue extinct*, is where any lands are given to a husband and wife and the heirs of their body in special tail, and one of them dies without issue had between them, the survivor shall hold the land as tenant in tail after possibility of having issue.

This is an estate which none can have but the donee or tenant in special tail; for the donee in general tail may possibly have issue at any time.

Where the donees in special tail have issue, if the issue die without issue, so that there is none other left which may inherit by force of the entail; the survivor of the donees will have an estate in tail after possibility of issue extinct.

These tenants in tail, as also tenants by the curtesy, or for life, suffering a recovery without the assent and to the prejudice of him in remainder, incurred a forfeiture of their estates; and such recoveries were void.

But tenant in tail after possibility of issue extinct is not punishable for waste, as is the tenant for life; but the waste, as timber felled by him, does not thereby become his property, but of the first person then living who has an estate of inheritance.

It is observed that by settlements guarding against accidents, and limiting remainders over, this estate now seldom happens.

The *Estate held by the Curtesy*, is when a man takes a wife, who is seised of lands and tenements in fee-

simple, or in fee-tail general, or as heiress in special tail, and he hath issue by her male or female, which by any possibility may inherit, and then the wife dies.

Here the husband, after the wife's death, shall hold the lands during his life, by the curtesy of England.—1 *Inst.*

And although the issue by the wife, being born alive, die immediately, the husband shall be tenant by the curtesy; and it matters not whether the child were ever heard to cry: but in case a child is ripped out of the mother's belly, after her death, though it be alive born, it will not give tenancy by the curtesy.

If lands are given in tail to a woman and the heirs male of her body, and she afterwards marries, and has issue a daughter, and dies, the husband shall not hold the estate by the curtesy; for this issue cannot possibly inherit.—*Termes de Ley.*

In case lands or tenements descend to the wife, after the husband hath issue by her, he shall be tenant by the curtesy; but not of a reversion or remainder expectant of which she never was seised.

When the lands are gavelkind, the husband holds only a moiety of them, and loses even that by a second marriage.

The *Estate in Dower* is that estate or portion of the husband's lands, which the law allows a widow after his decease.

By the *Common Law*, this dower is where a person is solely seised of lands or tenements in fee-simple, or fee-tail general, or as heir in special tail, and marries a wife and dies; his widow shall have a third part of all lands or tenements as were the husband's, at any time

during the coverture, to hold during her life, but not of copyholds, except by the custom of the manor.

This estate the widow shall have, whether she had issue by her husband or not; and it is not necessary that seisin should continue to the death of the husband; for if he sells or aliens the lands, it is still the same.

The law of dower is now regulated by the 3 & 4 *Will.* 4, c. 105; and under this act equitable estates in possession are made liable to dower, and the actual seisin of the husband is dispensed with.

The husband may bar the wife's right to dower by a declaration in deed or will to that effect.

Dower *by Custom*, is such part of the husband's estate, to which the widow is entitled after the death of her husband, by the custom of some manor or place, so long as she lives sole and chaste.

And it is frequently more than one-third part; for in some places she shall have half the land, and in others the whole during life, which is then called her *free bench*.

At common law dower was to be assigned by the sheriff, on the king's writ; or by the heir, &c., by agreement among themselves; and anciently a woman was to live and continue a whole year in the house of the husband for the assignment of the dower.

But by *Statute*, the widow shall immediately on the husband's death have her marriage inheritance, and shall remain in his chief house forty days, called the widow's quarantine, within which time dower is to be assigned her of the third part of the lands and tenements of the husband.—*Magna Charta*.

A woman may be endowed of the principal messuage, if it be not a castle; and of things whereof no

division can be made, the dower must be assigned in a special manner; as the third presentation to a church, &c.

The wife of one who held lands as tenant in common with another, though not of a joint-tenant, shall have dower; and she shall hold her part in common with the other tenants.

On a tenant in tail's dying without issue, whereby the land reverts to the donor, and the estate-tail is determined, a woman may be endowed thereof.

And a devise of lands by the husband to his wife by will, is held to be no bar of her dower, but a gift of benevolence; and therefore she may enjoy both.

For dower is much favoured in law, being for the benefit of widows; and therefore, though the husband be convicted of felony, &c., the widow shall have her dower: but not if he be attainted of treason; nor the wife of an alien, unless it be the queen consort.

If a wife commits either treason or felony; or in case she elopes from her husband, and lives willingly with the adulterer, she shall forfeit and lose her dower.

Yet it is otherwise if the husband be afterwards reconciled to her, and she returns to him again, for then she shall be endowed.—2 *Inst.* 435.

Although a man grants his wife over to another, and she by force of the grant does live with the grantee, during the life of the husband, her dower becomes forfeited.

Such a grant is void, and the wife lived in adultery notwithstanding.

By detaining the title deeds of the estate from the heir, or by aliening the lands assigned for her dower.

Formerly, when a wife levied a fine or suffered a re-

covery with her husband, she thereby barred herself of dower; but fines and recoveries were by the statute of 3 & 4 *Will.* 4, c. 74, abolished, and a new species of assurance, called an acknowledgment, substituted in their stead.

There are *Jointures* usually made by the husband of great estates, in lieu of dower, by virtue of the statute 27 *Hen.* 8, c. 10.

And a jointure is contrived for the wife, to take effect presently in possession or profit, after the death of the husband, for her own life; and it must be in satisfaction of her whole dower, and be so expressed; it may be also made either before or after the marriage; so it may be by devise, and she may have her choice.

In case the same be made before marriage, the wife cannot waive it and claim dower, even though she were under age at the time of marriage; but if made after marriage, it is waivable, for then she may refuse the lands appointed in jointure, at the husband's death, and have her dower.

If the wife be evicted of her jointure, she shall be endowed according to the rate of the husband's lands, whereof she was dowable at common law.

A wife, at the death of her husband, may enter on her jointure, without bringing an action; and a jointure is not forfeited by the treason of the husband, nor by adultery in her, as in cases of dower.

The *Estate for Life*, is where a person holds land or tenements let or granted to him for his own life, or the life of some other person (*pur autre vie*); on which lease or grant, livery of seisin is made;

This estate may be made both for a man's own, and another's life; but that for his own is greater than for another's: and it is a freehold estate, though accounted the least in the law.

If a lease be granted to a man and his assigns, to hold the land during his life, and the lives of two other persons; he hath but one estate for his own and the other two lives, and it is good with such limitation.

But where a person grants land to one, to hold to him and also to two others for their lives, none can take but the first person, because he is only party to the deed, and the rest are only named in the *habendum*, and not the grant.

By the common law, a lease for life cannot be granted to commence at a day to come; because livery and seisin may not be made to any future estate.

Yet if after the day the lessor make livery it will be good; and a lease for life in reversion, or for years, may be made to begin at a future day.

Where a grant or lease is made for life or years, as the timber trees are annexed to the land, the lessee has only a special interest therein, to have the mast and shadow for his cattle.

And when they are severed from the lands, or blown down with the wind, the grantor or lessor shall have them as parcel of his inheritance.

But if a house, or part of it, falls down, the lessee hath an interest to take the timber to re-edify it; and every tenant for life, or years, may cut, of timber or wood upon the lands demised, necessary *house-bote*, and *plough-bote* for repairs, *fire-bote*, &c. without doing waste.

These are called *estovers* in the law, and are incident

to the estates of the lessees, if no mention be made thereof in their grants.

In case any tenant for life of an estate remain beyond the seas, or elsewhere absent himself for the space of seven years together, and no sufficient proof is made of his being alive, in any action brought by the lessor or reversioner, he shall be taken as dead.—19 *Car.* 2, c. 6.

And by another *Statute*, if a lessee for life be not produced, on moving the lord chancellor to that purpose, and affidavit being made by those in remainder, &c. that they believe he is dead, they may enter upon the estate.—6 *Ann.* c. 18.

If a lease or grant of an estate be made for the term of one thousand years, it is only a chattel and no freehold, nor of so high a nature as an estate for life.

Tenants for life shall not be prejudiced by the sudden determination of their estate. Where it is by the act of God, or the act of law, the representatives shall have the emblements, or crops sown by the tenant for life; but not when it is determined by the tenant's own act; although, even in the latter case, if the lands be in the hands of under-tenants they shall not be prejudiced; and by stat. 11 *Geo.* 2, c. 19, the executors shall recover a proportion of the rent due from the last day of payment to that of the death of such lessor. These advantages of emblements are extended to the clergy by stat. 28 *Hen.* 8, c. 11.

The *Estate for Years*, is when lands or tenements are let to another person, for a certain term or number of years.

Where a tenant for life, and he in remainder in fee grant an estate for years; it is the lease of the tenant for life, so long as he lives, and the confirmation of him in remainder.

And after the tenant for life's death, it will be the remainder man's lease or grant for the rest of the term.

A man having an estate for years in land, in right of his wife, makes a lease thereof to commence after his death; and then dies; though the wife survive him, this has been held good against her.

For the husband during his life might have sold the whole term which his wife had in the lands, or any part thereof; but she shall have so much as is undisposed of by him.

If the estate of lessee for years ends before corn or grain is ripe, the landlord or he in reversion will be entitled to it; but it is otherwise in case lessee for life dies, the same shall go to his executors; and if the estate of tenant at will be determined by the lessor, such tenant may have the grain.—(*Vide supra.*)

In the case of the lessee for years, it was his own folly to sow the land, when he knew his term would expire before the corn could be ripe.

A tenant for years is immediately to enter on the lands let, and he is not in possession to bring an action of trespass, until actual entry.

The *Estate at Will*, is where lands are let to any person, to hold at the will of the lessor; or of both parties, the lessor and lessee.

In case a person enters into land with the owner's consent, he is tenant at will; so it is if a man be in possession, and has paid any rent to the landlord,

although there was no agreement between the owner of the land and the tenant.

But estates at will are in general now considered as tenancies from year to year, and cannot be determined without reasonable notice to the other, which is six months determinable at the end of the year, when the tenancy expires.

A tenant at will is not obliged to repair the premises, as the lessee for years is; though if he commits voluntary waste, an action of trespass lies against him.

If the tenant at will grants over his estate to another, or if the lessor dies, the lease will be determined.

And then if a person continues in possession, he must become tenant at *sufferance.*

To recover these the landlord is bound to make a formal entry. By stat. 4 *Geo.* 2, c. 28, tenant holding over after notice from the landlord or reversioner, is liable to pay for the time he *detains* them double the *yearly value;* and by stat. 11 *Geo.* 2, tenant giving notice of his intention to give up the premises, and continuing to hold over, shall be liable to pay *double rent* for such time as he continues in possession.

The *Copyhold Estate,* that is held by *Copy of Court Roll,* is an estate in lands and tenements, which tenants have had time out of mind, to them and their heirs in fee, or for lives, at the will of the lord, according to the custom of the manor.

This is called a *Base Tenure,* because in former times the copyholder held only an estate at the will of the lord, in judgment of law; but now by the custom of manors, these estates are descendible, and the heirs of the tenant shall inherit them.

Yet copyholders may not plead, or be impleaded, for any thing relating to their tenements, by the king's writ, but they are to enter a plaint in the lord's court; unless the lord pretend to expel them out of their estates.

In which case they may sue a *subpœna* out of the chancery to be relieved, or have action of trespass against the lord.

It is by surrender and admittance in the lord's court, that copyhold estates regularly pass from one to another:

A copyholder cannot transfer his interest to a stranger, in any other way than by surrender to the lord, according to the custom, to the use of him that is to have the estate.

If a man would exchange his copyhold estate, it must be done by surrender; and formerly, if he would devise it, it must have been by surrender to the use of his will: but now it is otherwise by 1 Vict. c. 26, s. 3.

A married woman may receive a copyhold by surrender from her husband, because she comes not in immediately by him; but on the admittance of the lord.

Upon a surrender, the person to whom made is to be admitted tenant; and the party making it continues tenant till the admittance of the surrenderee; but he cannot pass away the land or subject it to any other incumbrances, but those at the time of the surrender.

Till admittance, which is the giving of possession, the copyhold tenant hath not an estate in the lands, which he may surrender to another; except in the case of an heir by descent.

A surrender made out of the lord's court is to be

presented at the next court; as if the surrenderor or surrenderee die before it is presented, in that case a presentment afterwards makes it good.

If the tenants refuse to present a surrender thus made, they are compellable to it in the court of the lord.

There are fines payable to the lord on all admittances in fee; and on the death of a copyholder for life, a *heriot* of the best beast or goods is due to the lord, according to custom.

And if the heir on the death of his ancestor do not come in to be admitted, upon three proclamations made in court, he may forfeit his estate. But see stat. 9 *Geo. 2*, c. 29.

By custom, the widow of a copyholder in fee may have *free bench*, after the death of her husband; and there is also a *Widow's Estate* annexed to the copyhold for life.

Though it is held, if the copyholder surrenders to the use of another, and then dies, the surrenderee shall have the land, and oust the widow of her estate.

Copyholds are not within the Statute of jointures, or of uses; nor shall be extended in execution for debt; for they are not assets to bind the heir, &c.

And yet they descend according to the rules and maxims of the common law—"*Consuetudo manerii et loci.*"

CHAPTER VI.

RULES RELATING TO THE CONVEYANCE AND DESCENT OF LANDS, AND DISTRIBUTION OF PERSONALTY.

SECT. 1.—*Deeds and Conveyances of Lands.*

THE *Deed of Feoffment* is a grant or conveyance of any manors, messuages, lands, or tenements, to another in *fee;* that is, to him and to his heirs for ever, by delivery of *seisin* and possession of the estate granted.

A feoffment is the most ancient conveyance of lands at common law; and was said to excel a fine and recovery, for it clears all disseisins, abatements, intrusions, and other wrongful estates.

And which neither fine, recovery, nor bargain and sale by deed indented and inrolled, could effect.

It also bars the feoffor from all collateral benefit in respect to conditions, powers of revocation, writs of error, &c. and destroys contingent uses.

But no deed of feoffment is good to pass an estate without livery of seisin; so that if either of the parties die before livery, the feoffment is void.

If a bargain and sale of lands be not inrolled, and the bargainor delivers livery and seisin of the land, according to the form of the deed, it has been held to be a good feoffment.

Though where one makes a feoffment without any consideration of money, &c., by that the estate passes, but not the use, which shall descend to the feoffor's heir.

Since the statute of uses the deed of lease and release has taken place of this deed, as it unites the use and possession, without entry.—27 *Hen.* 8, c. 10.

The *parties* to deeds are termed feoffor and feoffee, grantor and grantee, bargainor and bargainee, lessor and lessee, devisor and devisee, obligor and obligee, &c.

The *Deed of Lease and Release*, as used in our law, signifies a certain instrument in writing, for the conveyance of a man's right or interest in lands and tenements in fee to another person, who hath possession thereof.

A lease and release make but one conveyance, being in nature of one deed; and it amounts to a feoffment, the use, by operation of the statute, drawing after it the possession, and supplying the place of livery and seisin, required in that deed. This mode of conveyance was invented by Serjeant Moore, although its validity was once doubted.—2 *Mod.* 252.

This deed is now the usual conveyance of lands or tenements: in the making whereof a *lease* or bargain and sale for a year, bearing date the day next before the day of the date of the release, is first prepared and executed.

To the intent that by virtue thereof, and of the *sta-*

tute made for transferring uses into possession, the lessee may be in the actual possession of the lands, &c. intended to be granted by the release, and be thereby enabled to take a grant of the reversion and inheritance of the said lands to him, his heirs and assigns, for ever.

On which the release must be executed, reciting the lease or bargain and sale for a year, and declaring the use.—27 *Hen.* 8, c. 10.

The lease for a year, different from other leases, must have the words *bargain* and *sell* in consideration of a sum of money; and five shillings, though never paid, is a good consideration, whereby the lessee for a year becomes immediately in possession, on executing the deed, without any entry made.

And it is held, if only the words *demise*, *grant*, and to *farm let*, are used in the lease or bargain and sale for a year, in that case the lessee cannot accept of a release of the inheritance until he has actually entered and is in possession.

It is proper in the lease for a year to reserve a peppercorn rent, which is judged sufficient to raise a use; so as to make the lessee capable of a release.

The person who makes the release must not only have such an estate in himself, whereout the estate may be derived to the releasee;

But also the releasee is to have an estate in possession, that is, in deed or in law, in the land of which the release is made, as a foundation for this release, which is the object of the previous lease.

And there must be sufficient words to make the release and to create and raise a new estate, or it will not be good.

A release made by a person who at the time of making thereof has no right to the lands; or if it be made to one who at that time hath nothing in the lands, is void in law.

For he ought to have a freehold therein, or a possession or privity; and without privity between the tenant in possession and the releasor, a release will not operate.

These releases that enure by way of passing an estate may be made upon a condition, &c., so as it be contained in the same deed, or delivered at the same time with it.

The conveyance by *Fine and Recovery*, although now abolished by the 3 & 4 *Will.* 4, cap. 74, requires here to be noticed, as it must frequently occur in the course of examination of titles and the perusal of abstracts.

It was an assurance by matter of record, and was a final agreement or conveyance for the settling or assuring of lands or tenements, and was acknowledged in the king's court by the cognizor to be the right of the cognizee, the person to whom the acknowledgment is made.

The *fine* was commonly upon a feigned action on a writ of covenant, &c., and supposed some controversy (when in fact there was none) to secure the title which a person had in his estate against all others.

Or it was to cut off intails, so that lands might with the greater certainty be conveyed, either in fee, tail, for life, or years.

And as a fine for its better credit was supposed to have been made in the presence of the king (being levied in his Court of Common Pleas), it therefore was binding upon

married women, who were parties, and others whom the law generally disables from acting.

But where a feme covert was party, she was secretly examined by the judge or commissioner taking the fine, whether she consented freely thereto, or otherwise the fine could not pass.

A fine was either *single* or *double*, which might be with a *render* back again of the lands; and with proclamations according to the statutes, or without them at common law; but those by statute were the best and most used.

There were likewise four sorts of fines;

1st. The fine "*sur cognizance de droit come ceo que il ad de son done*," *i. e.* an acknowledgment of a former grant or gift in possession.

2nd. The fine "*sur cognizance de droit tantum*," or mere acknowledgment of the right.

3rd. The fine "*sur concessit*," whereby without acknowledging a precedent right, the cognizor granted an estate *de novo*.

4th. The fine "*sur done grant et render*," comprehending the first and third sort to create particular limitations; but the first was considered the principal and surest kind of fine, as it gave present possession to the cognizee, without any writ of execution: and this was also a *fine according to the statute*.

Upon levying the fine, privies in blood, as the heirs of the cognizor, were barred presently thereby.

But strangers to the fine, who were not parties or privies, had five years' time allowed them to enter on the lands, &c. and claim their rights.

The like time was given to infants, after they came to full age, and to feme coverts not joining in the fines

after the death of the husbands; also to prisoners after they were set at liberty, and persons out of the realm on their return, &c.

And a future interest could not be barred by a fine, till five years after its coming *in esse;* as in case of a reversion or remainder in lands.

A person having two titles had two five years to make his claim; and where there was no present nor future right in land, &c., but only a possibility at the time of levying the fine, a man might enter and claim when he pleased.

On a fine, uses were frequently raised and created, &c. declared by *indentures* made before or after levying the fine; in the former case they were said to *lead,* in the latter to *declare* the uses.

And the usual fine barred the issue in tail, but not those in reversion or remainder.

A *Recovery* was also a formal act by consent on record, made use of for the better assurance of lands and tenements, and originally invented to elude the statute of mortmain.

And the end and effect of this recovery (called in the law a *common recovery*) was to destroy estates-tail, remainders, and reversions, and bar the former owners thereof.

A common recovery was either with single, double, or treble voucher, and barred accordingly. To a recovery there must have been three parties at least, the demandant, tenant, and vouchee. It was so far of the nature of a fine, that it was a suit or action, actual or fictitious, upon which followed a supposed adjudication of the right, binding all persons, and vesting an absolute fee in the recoveror.

The *demandant* was the person or suitor in the action who brought the *writ of entry*, and therefore was termed the *recoveror:* the tenant was he against whom the writ is brought, termed the *recoveree;* and the *vouchee* was the party whom the tenant vouched and called to warranty for the lands demanded.

In prosecuting a recovery there was a colourable suit or action real, brought by the demandant, who was usually some friend of the person having the estate, and he, by a feigned count or declaration, pretended he was disseised of the land by the tenant.

Then the demandant was supposed to come into court, and this feigned tenant, if it was a single recovery, was made to appear and vouch to warranty the bag bearer to the *custos brevium*, or some officer of the court, who was called the *common vouchee*, and was supposed to warrant the title.

And this vouchee appeared as if he intended to defend the same, and for that end craved a day for making his defence, but on the day given he made default, so that the plaintiff or demandant had judgment to *recover* the land against the tenant or defendant, and he to recover in value against the common vouchee;

On which there issued out a *writ of seisin* for the possession of the lands.

In case the recovery was with double or treble voucher, then by fine, feoffment, or lease and release, the estate must have been discontinued, and a *tenant of the freehold* made of the land; and thereupon the practice was to bring a writ against that tenant, and he to vouch the tenant in tail, and he the common vouchee.

Whereupon judgment was given for the demandant against the tenant, and for the tenant to recover in va-

lue against the vouchee, and so the first vouchee against the second, &c., as the recovery was brought.

These recoveries were much favoured in law, many of the inheritances of the kingdom depending upon such kind of assurances: and they supposed a recompense in value to all persons that lost the estate; but such *recompense in value* was only imaginary, and created a bar to the intail for ever.

Where there was a tenant for life, with remainder in tail, and remainder or reversion in fee; if the tenant for life was impleaded by agreement, he vouched the tenant in tail, who vouched over the common vouchee.

This barred the remainder or reversion in fee, though he in reversion or remainder never assented to the recovery.

But if tenant for life alone suffered a recovery without the consent of him in remainder, it was no bar; also a recovery, though well suffered, barred only where there was a privity in law; that is, the issue, and he in remainder and reversion, &c.

It did not bar the heir, who claimed as a purchaser, and not by descent; and a stranger was not barred by a recovery and non-claim, as in case of a fine.

On suffering a recovery, a person might sell and dispose of his estate as he pleases; but either a fine or recovery might be avoided on account of error, or by reason of fraud and deceit, &c.

By *statute*, recoveries were held to be good, without conveyances from lessees to make tenants to the writ of entry, &c., so as such tenants conveyed to them an estate for life at least.

Purchasers having been in possession of the lands twenty years, might produce deeds making a tenant

for suffering any recovery, and declaring the uses, which were allowed to be evidence of it, though not regularly entered on record.

After that space of time, all recoveries are deemed valid, if it appears there was a tenant to the writ, and the persons had an estate sufficient to suffer them, notwithstanding the deeds are lost.—14 *Geo.* 2, c. 20.

By the act of the 3rd & 4th *Will.* 4, c. 74, no fine or common recovery could be levied or suffered after the 31st December, 1833.

They however must continually require the attention of conveyancers and others engaged in the perusal of titles.

The *Deed of Bargain and Sale,* is a deed or conveyance whereby the property of lands and tenements is, for good and valuable consideration, granted and transferred from one person to another.

It is called a real contract where a recompense is given by both parties to the bargain; as if one bargain and sell his land to another person for money, the money in that case is a recompense to him for the land, and the land to the other for the money.

And if money is mentioned to be paid in a bargain and sale, and in truth none is, some authors say it may be a good deed of bargain and sale because no averment lies against that which is expressly affirmed in the deed, except it be questioned as fraudulent.

Yet where a deed expresses a consideration upon a purchase, others hold this will be no proof upon a trial, that the money was actually paid, but the same must be made out by witnesses.

A bargain and sale of lands in fee, is to be by deed

indented and *inrolled* in one of the courts at *Westminster*, or in the county where the lands lie, before the *custos rotulorum*, and justices of peace.

And the inrolment must be made within six months after the date of the deed, to be accounted at twenty-eight days to the month.

But this extends not to bargains and sales for terms of years, &c., for they are good, though not inrolled, nor by deed indented.—27 *Hen.* 8, c. 16.

The death of either the bargainor or bargainee before the inrolment of this deed, will not hinder the passing of the estate.

But the freehold is in the bargainor until it is inrolled, and therefore the bargainee may not bring action of trespass before entry had; yet it is said, he may surrender or assign his interest.

By the statute of inrolments, the estate shall not vest except the deed be inrolled, but this being done, it settles and vests from the beginning, according to the statute of uses; the bargain first vests the use, and then the statute vests the possession.

Where a bargain and sale of land is made, it passes the freehold of the lands, and also reversions and remainders, without livery and seisin.

Though in general no person can make such deed of bargain and sale who has not the possession of the land at the time of the sale, for if he be not in possession, nor receives the rents, to make it good there ought to be livery, and the deed is to be sealed on the lands.

There is also a *Bargain and Sale of Goods*, which a person may at any time sell, even though an execution be coming out against him, unless there is a private

trust between the parties, and the writ of execution is delivered to the sheriff.

But a sale of goods upon a *Sunday* will not alter the property, and a contract for the sale of goods for 10*l.* or upwards, shall not be good, except the buyer receive part of the things sold, or gives something in earnest to bind the bargain, or some note thereof be made in writing signed by the party, &c.—*29 Car. 2*, c. *3*, called the statute of frauds.

An agreement for the sale of *lands* must be in writing and be signed by the seller, or it will not be binding; though money be given in earnest.

On any bargain or contract, where there is not what is called *quid pro quo*, it is void in law, and termed a *nude* contract (*nudum pactum*); but if the sum given be ever so small, the contract is good.

And if a contract or bargain be to pay money to another at a future day, and he dies before, it shall go and be paid to his executors or administrators.

Deeds of *Gift and Grant;* a deed of *gift* is a conveyance or instrument by which lands and tenements, or goods, are passed from one or another.

And a gift is of a larger extent than a grant, it being applied to things moveable and immoveable; this deed is also good, without any consideration; but great care must be taken that there be no fraud in making it.

For if a gift and conveyance of lands be made with intent to defraud a purchaser on good consideration, as against such purchaser, it shall be deemed void.

And the parties justifying the same to be *bonâ fide* made, were to forfeit a year's value of the lands, &c.,

and likewise to be imprisoned.—*27 Eliz.* c. *24*, perpetuated by *39 Eliz.* c. 18.

So it is where any deed of gift or grant is made of lands or goods to deceive creditors of their just debts, as to the creditors it is void in law, but not against the party himself that makes the deed, or his executors, &c. against whom it remains good.

A general deed of gift of all a man's goods, is liable to suspicion of being fraudulent, though a true debt be owing to the party to whom made, and it is void against other creditors.

And the several marks of *fraud* in law, are, if a gift of goods be general; if the donor continues to possess and use the goods; if the deed be made in secret, or upon any implied trust and confidence; or if done whilst an action is depending.

Therefore, whenever a gift is made in satisfaction of a debt it is proper to have it done in a public manner before witnesses of credit, and that the goods and chattels at the same time be appraised to the full value.

In some cases, there is a *gift in law;* as where a person is made executor of a will, or marries a woman, the law, in the one case, gives him the testator's goods, and in the other case, the goods of the wife, liable to satisfy debts.

A *Grant* is a conveyance in writing of such incorporeal things as lie in grant, and not in livery; and grants are made by persons who cannot give but by deed.

Here the things grantable are reversions, advowsons in gross, tithes, rents, services, commons, and such like, but generally we say land is granted in any deed, and the words *give* and *grant*, &c., of what lies in

grant, will amount either to a gift, grant, feoffment, or release, &c., and there pass merely by delivery of the deed.

There must be a foundation of interests in grants, or they will not be good; and the law does not allow of a grant of titles only, or imperfect interests, or of rights, as are merely future.

A grant shall be taken in favour of the grantee; also the grantee himself is to take by the grant, and not a stranger; in case lands are granted by deed, the houses that stand thereon pass to the grantee.

And by the grant of all the lands, the woods will pass; but trees in boxes, &c., do not pass in such a grant, because they are separated from the freehold.

In every grant there must be a grantor or person able to grant, and a grantee capable of taking the thing granted, something granted which lies in grant; it is to be done in the manner the law requires, and there must be an acceptance of the grant by him to whom made.

One attainted of treason or felony, may make a grant, and it shall be good against all persons but the king, and the lord of whom the land is held; and against them too for his relief in prison.

If any grants are made by persons *non sanæ memoriæ*, they are good, as to themselves, but voidable by their heirs, &c., and though infants, and feme coverts, are not capable to be grantors, yet they may be grantees.

But subject to the disagreement of the husband to the grant made by the wife, and of the infant to his grant at his full age.

Where there appears to be a want of certainty, or

impossibility in grants, or when they are against law, they are judged void.

A *Lease of Lands*, &c., is a demise or letting of lands or tenements to another, for term of life or years, under a *rent* reserved.

All leases that exceed three years, are to be reduced into writing; and if the substance of a lease be put in writing, and signed by the parties, though it be not sealed, it shall have the effect of a lease for years.—29 *Car. 2*, c. 3.

And where a lease is sealed by the lessor, but the lessee hath not sealed the counterpart; the same is binding, so as an action of covenant may be brought against the lessor upon the lease.

If articles of agreement only are made, with covenants to make a lease for a term certain, at and under so much rent, this implies a lease, and has been so adjudged, and must now be stamped with a lease stamp, before they can be given in evidence.

Also the words to *have* and *possess* lands in consideration of yearly rent, will make a lease of the land; and a licence to occupy and take the profits, &c. amounts to a lease.

Leases may be made for any number of years or months, &c. But the term must have a certain commencement and determination; and if by reference to a certainty, it may be made certain, the lease will be good; "*id certum est quod certum reddi potest.*"

A lease is frequently granted for twenty-one years, if the lessee shall so long live; and is good, though it contains a certainty in an uncertainty.

One makes a lease from three years to three years,

it is good for six years; but where a lease is made in writing for a year, and so from year to year, as long as both the lessor and lessee shall agree, this is binding but for a year.

Yet if the lessee does enter upon the second year, he thereby becomes bound to hold the land, &c., that year.

It is a *maxim* in law, that *rent on leases* must be reserved to him from whom the land moveth; as the lessor or his heirs, &c.

If a lease is made for years of lands in fee-simple, rendering rent to the lessor, his executors or assigns, during the term; the heir shall have the rent as incident to the reversion.

So where the lessor dies before the day of payment of rent, it shall go to his heir; but when it grows due in the lessor's life-time, it goes to his executors.

In case a person makes a lease of lands, yielding rent at such a feast, or within one month after, and the lessor dies between the feast day and the end of the month, the rent must be paid to the heir, and not the executor; because until the month's end it was not due.

If a tenant for life dies on the day on which the rent was reserved to be paid, his executors, &c. in an action may recover the whole rent of the under-tenants; or if he die any time before such day, a due proportion thereof; see the recent statute for the apportionment of rents, 4 & 5 *Will.* 4, c. 22, intituled, An Act for the amendment of 11 *Geo.* 2, c. 19, respecting the Apportionment of Rents, Annuities, and other periodical Payments.

Lessees that hold over lands after the expiration of

their terms, shall pay double value; and when tenant determines his tenancy by notice of his intention to quit, and holds over, he shall pay double rent; *Stat.* 4 *Geo.* 2, c. 28, and 11 *Geo.* 2, c. 19; and when half-a-year's rent is due from any tenant, and no distress can be found on the lands, the lessor or landlord may serve an ejectment on the land, and have judgment to recover, &c.

But a lessee in such case may, within six months after, file his bill in equity, and be relieved thereon.

And if a tenant in arrear one year's rent, shall desert and leave the premises, two justices of peace, at the landlord's request, may enter upon and view the lands, &c. And if, on notice fixed by them, the tenant does not return and pay the rent, his lease shall become void.—11 *Geo.* 2, c. 12.

A person of common right may distrain for rents, though there be no clause of *distress* in the leases, so as he have the reversion of the lands.

The distress for rent is to be taken on the land chargeable therewith; and it must be made of such things whereof the sheriff may make replevin, and deliver in as good condition as at the time of the taking.

Any goods may be taken in distress, as well as cattle; another's goods in the tenant's house, and beasts of a stranger in the landlord's ground, being levant and couchant, may be likewise distrained.

For the land is debtor for the rent, and the landlord need not inquire whose cattle they are that he finds therein.

Where goods or chattels shall be distrained for rent reserved upon any lease or contract, if the goods are not replevied by the tenant within five days after such

distress, and notice thereof, they may then be appraised by two sworn appraisers, and sold by the person distraining, with the under-sheriff, or constable of the place, &c.

An inventory is to be taken of the goods distrained in the presence of witnesses; and the constable, &c. must swear the appraisers, to appraise them truly; and the debt being satisfied by the sale, the overplus of the money, if there be any, is to be left in the constable's hands, for the owner's use.—*2 W. & M.* c. 5.

An appraisement made by the party making the distress is irregular.—1 *Stark. N. P. R.* 172.

If any tenant fraudulently carries away his goods, to prevent a distress, the landlord within thirty days after may distrain them, wherever they are; and the tenant and persons assisting in the fraud, shall forfeit double the value of the goods, which may be prosecuted in a summary manner before the justices, or by action.—*Stat.* 11 *Geo. 2.*

In order to enable a landlord to follow goods, the rent must be in arrear, and the goods have been clandestinely removed.—*3 Esp.* 15.

And where such goods are concealed in any house or place, on oath made of reasonable ground of suspicion before a justice of peace, by his warrant the house may be broken open to distrain them.

The landlord may also distrain any cattle of the tenant's feeding on commons, or corn, grass, or fruits, growing on the lands, and cut, gather, cure, and dispose of the same, &c.

This is in case the tenant does not before pay the rent, and all costs and charges.—11 *Geo. 2,* c. 19.

On a rescous of goods distrained, treble damages

and costs may be recovered against the offenders, by action on the case.

And if any distress or sale be made where no rent is due, the owner of the goods distrained may, by an action of trespass, recover of the persons distraining double the value and full costs.

The *Deed of Mortgage*, is a conditional conveyance of lands or tenements, &c. as a security for money borrowed.

A *vivum vadium*, or living pledge, is where an estate is granted to be held until the rents and profits received shall have repaid the sum borrowed, immediately on which the estate results back to the borrower. But *mortuum vadium*, or dead pledge mortgage, is when an estate is granted in fee, with a condition for re-entry if the borrower shall repay the sum on a certain day; and in case of nonpayment the estate is absolute in the mortgagee.

It is called *Mortgage*, because the lands are as a *dead pledge*, until the money borrowed is repaid; or for that, if the money be not paid at the day, the land dies to the debtor, and is forfeited to the creditor.

And mortgages may be made in several ways; as by lease for a long term, lease and release, or assignment, &c. but they are commonly made by lease for five hundred years or more, wherein a pepper-corn rent is reserved.

In which deed there is contained a *proviso* or condition, that if the money is paid at the day agreed, the deed shall cease and be void.

And here, until failure be made in payment, the mortgagor holds the lands in fee; but if failure is made,

on which the mortgagee enters on the land, yet the mortgagor has an *equity of redemption*, and may call the mortgagee to an account for his receipt of the profits.

Likewise the mortgagee, if he wishes to bar the equity of redemption, may call the mortgagor to account, either to pay what is due, or be foreclosed of his equity of redemption; which the Court of Chancery will generally order, though upon the mortgagor's paying the interest of the money, these mortgages often continue a long time. After twenty years' possession by the mortgagee, the court will not permit a redemption except under special circumstances.

The right or interest in lands mortgaged is by law in the mortgagee before forfeiture; he has purchased the land as it were upon a valuable consideration, as the law will intend.

For though the mortgagor may redeem, yet it is not certainly known whether he will do so or not; and if he does not, the estate becomes absolute in the mortgagee, who is esteemed in possession on executing the mortgage: therefore if the money be not paid, whereby the same is forfeited, the mortgagee may bring an ejectment without actual entry.

As the mortgagor's heir is interested in the condition, he may pay the money, and save the forfeiture; and so may executors, &c. And it is held, that mortgages are a part of the personal estate, if it be not otherwise declared by a mortgage in fee.

The personal estate of the mortgagor shall also, in favour of the heir, be applied to pay the mortgage, where there are assets besides for the payment of all legacies.

In case lands are thrice mortgaged, it has been ruled in equity, that a third mortgagee may buy in the first incumbrance, and thereby shall hold against the second mortgagee.

But that is, unless such second mortgagee shall satisfy the money paid by the third mortgagee to the first, and also his own, which he lent on the last mortgage.

And where persons having once mortgaged lands, do mortgage the same a second time, without discovering the first mortgage, there equity of redemption will be forfeited, and the second mortgagee may redeem, &c. by stat. *4 W. & M.* c. 16.

When any action of *ejectment* is brought for recovering land, &c. mortgaged, and there is no suit in equity for foreclosing or redeeming it, if the person entitled to redeem shall, pending the action, bring the principal and interest due, with costs, into court, it shall be taken as a full satisfaction of the mortgage.

And the mortgagee shall thereon be obliged to reconvey the land to the mortgagor, and deliver up all deeds.—*7 Geo. 2*, c. 20.

The *Deed of Surrender*, is an instrument whereby a particular tenant of lands, &c. for life or years, doth yield and give up his estate to the person who has the immediate reversion or remainder, so that he may have the present possession thereof, and is directly opposite in its nature to a release.

There is likewise a surrender without deed, called a surrender *in law*; as where a person has a lease of a term, and during the term of his lease takes a new lease

of the same lands, it will be a surrender in law of the former lease.

And this surrender shall take effect, though the second lease be for a less term than the first; and although it is made upon condition, or be a voidable lease, for both the leases cannot stand together in one person.

A lease is made for years, to commence at a future day, this interest may not be surrendered by deed; but if the lessee before the day does accept of a further lease of the land, thereby the first lease becomes surrendered in law;

And thus the surrender wrought by operation of law, is of greater efficacy than that made by deed, entered into by the party.

In the making a surrender, the surrenderor must have an estate in possession of the lands surrendered; the surrenderee is to have a higher estate in his own right, that the surrenderor's estate may be drowned therein; and he must be sole seised of his estate in reversion, &c.

Therefore a tenant for life cannot surrender to him in remainder for years, and no livery of seisin is necessary on account of the privity of estate betwixt them.

A surrender may be absolute or conditional, and be to a use; but it cannot be made of an estate in fee by the common law; nor may one termor regularly surrender to another.

If a lessee for life surrenders to one in remainder for years, it is void.

A *Will*, or *Last Will and Testament*, is a solemn instrument in writing, whereby a person declares his

mind and intent as to the disposition of his lands, goods, or other estate, or of what he would have done after his death.

The last act which was passed relating to wills, is the 1 *Vict.* c. 26, and by which act all future devises are governed, and the forms of execution of wills in general are regulated.

In a will where lands are given, the gift is called a *devise;* but when goods and chattels are given, they are termed a *legacy;* and in a will of personal chattels, there must be an *executor* appointed, but he has nothing to do with the freehold lands. Copyholds were held not to be within the statute 29 *Car.* 2, c. 3; and now they will pass by a will sufficiently attested, without a surrender by testator to the use of his will.—1 *Vict.* c. 26.

All persons that have a sole estate in fee-simple of any lands or tenements, may devise and give away the same by will to whom they think fit; and this extends to persons seised in coparcenary, or as tenants in common.—34 & 35 *Hen.* 8, c. 5.

Lands intailed are not deviasble, only those held in fee, and goods and chattels; and wills made by infants, &c. or persons not of sound memory, are not deemed good in law; formerly an infant of the age of fourteen might make a will of his goods or chattels, but now no will made by a person under age is valid.

By the statute for prevention of *frauds*, wills and devises of lands, &c. shall be in writing, and signed by the devisor, or some other by his express directions, in the presence of two credible witnesses.

And no will made in writing shall be revoked, but by some other will that is made in writing, and of equal

solemnity with the instrument it is intended to revoke, or by destroying the same, by the testator himself, or by his direction.—1 *Vict.* c. 26, s. 20.

A general devise of the testator's lands will include copyhold, freehold, and leasehold lands.

It was formerly held that lands bought after the making of a will, did not pass by the devise of all lands and estate, whereof the testator should die possessed; and also that a devise of lands was not good if the devisor at that time had nothing in them, but this is also altered by the statute 1 *Vic.* c. 26.

In such cases a bequest of personal things was always construed good, though the testator had them not at the time of making his will.—1 *Salk.* 257, pl. 16.

A term may be devised by will to one for life, with a remainder to another for the residue of the term.

But a personal chattel may not be given to one during life, with remainders to others; yet the use thereof may, and the thing itself afterwards to another.

By way of future executory devise, land may be devised to an infant in *ventre de sa mere*, and be good; it is otherwise by a grant or gift, where there ought to be one of ability to have presently.

If the lands are devised by will to a person, to hold to him for ever, the devisee shall have a fee-simple; so where land is given to one to dispose of at his pleasure, or when a man devises that such a one shall be his heir, and have all his inheritance.

But if a devisee of lands be to one, without any more words, or if it is of all a man's estate, it passeth only an estate for life, and not a fee by implication.

But words of perpetuity are not essential to a devise

of the fee-simple, where it appears to be the intention to dispose of all his interest in an estate.—2 *T. R.* 656.

The law requires certainty in the description of persons and things in a will, and if land be given to a man who shall marry the testator's daughter, or to him and his children, &c. it is certain enough.

A condition in a will, that a woman shall not marry such a person, or without consent of another, is unlawful and void, except the portion on the marriage be limited over to some other person, who in that case may have the legacy.—5 *Vin. Abr.* 343, pl. 41.

If a man bequeaths one thousand pounds to his daughter at the age of twenty-one years, and she dies before, the legacy is extinguished and gone;

But in case such legacy had been to be paid her at that age, it is then *debitum in præsenti, et solvendum in futuro*, by construction of law, and the daughter's administrator, &c. shall have it on her dying before.

Yet it is said, that words in wills ought to be always construed according to the intention of the parties that make them, as near as can be collected; and the intent in a will sometimes makes estates pass contrary to the rules of law, with respect to other deeds.

No will has force till after the death of the testator, but then it gives and transfers estates, and alters the property of lands and goods, as effectually as any deed or conveyance executed in a man's life-time.

And thereby descents may be prevented, estates in fee-simple, fee-tail, for life or years, may be made, and he that takes lands by devise is in nature of a purchaser.

A person can make but one will to take effect, though he may make as many *codicils* as he pleases.

The last will made, or where in a will there happens to be two devises of the same thing, the last devise only stands in force. When the testator is moved to make his will by fear or threatenings, in order that he may be at quiet, &c. it may be set aside.

An *executor* of a *will* is he to whom another commits, by will, the execution of that his last will and testament, and his duty is to assent to the devise of goods, &c., and to make an *inventory* of all the goods and chattels of the testator, with their value, &c. in the presence of two legatees, or other sufficient persons.

He must then prove the will in the spiritual court by his own oath, or by witnesses, if required; and the copy thereof in parchment delivered to him under the ordinary's seal is called the *probate.*

Where the testator has goods only within one diocese this is done in the prerogative court of that diocese, but if there be goods (*bona notabilia*) above *5l.* in value in two or more dioceses, the probate shall fall within the archiepiscopal prerogative.

After this is done, the executor is to collect the debts and to pay all debts of the testator before legacies, in the following order, viz.: the charges of the funeral being first satisfied, the king's debts shall be preferred; then debts on judgments, and statutes or recognizances, those due on mortgages, bonds, and other specialties, rent on leases, servants' wages, debts on shop books, &c.

And if an executor pays the debts in any other order, he is liable to the payment of any debt of a higher degree out of his own estate, by the common law.

The executor is to pay the legacies after the debts, and he may prefer a legacy to himself; also he may

pay what legacies he pleases first, or give to each legatee a part, in proportion, on there not being enough for paying every one his whole legacy.

And here the executor is not bound to order, as in the case of debts due from the testator, and no action at law can be maintained for a legacy unless he assents thereto.

After all debts and legacies are paid, he is to pay the residue to the residuary legatee, and if none, he is considered only as trustee for the next of kin, except when it is to be intended that the testator meant to give him the residue.

An *Administrator* is he who has the goods of a man dying *intestate*, without will, committed to his charge; and all such goods as come to the hands of the administrator, shall be *assets* to make him chargeable for debts to creditors, as executors are to the creditors and legatees.

The persons to whom administration is grantable by the ordinary, are mentioned in a subsequent section, as are all the several persons entitled by law to the distribution of the intestate's effects.

Sect. 2.—*As to the Descent of Lands.*

Descent is a means whereby lands or tenements are derived to any man from his ancestors.

It is a maxim in our law that lands shall descend from the father to the son; and that if a man have two sons by divers *venters* or wives, and the one purchases lands

and dies without issue, the other shall never be his heir, &c.

Descent at common law was either *Lineal*, or downwards in a right line, from the grandfather to the father, the father to the son, and the son to the grandson, &c., so that the lineal heirs shall first inherit;

Or it was *Collateral*, that which springs from the side of the whole blood, as another branch of it; such as the grandfather's brother, the father's brother, and so downwards.

The law relating to the descent of lands has received great alterations by the 3rd & 4th *Will.* 4, c. 106, which was an act passed in 1833 for the amendment of the law of inheritance.

The leading objects of this act are: first, to provide that a person last entitled to land shall be considered the purchaser, unless it be proved that he inherited the same.

Second. To declare that the heir of a testator taking under his will shall be considered as taking as *devisee* and that under a limitation to a grantor or his heirs, such person shall be considered as a *purchaser*.

Third. To declare that brothers and sisters shall not inherit immediately from each other, but that every descent from them shall be traced through the parent.

Fourth. To enable the lineal ancestor to inherit from his issue in preference to collateral relations.

Fifth. To make the half-blood capable of inheriting next after any relation in the same degree of the whole blood and his issue.

Sixth. To allow descents to be traced through persons who have been attainted.—See *Shelford's Real Prop. Acts*, 337.

In order to understand the present law of descents, a table similar to that in Mr. Shelford's valuable book, has been inserted at the commencement of this work, which will explain the whole law relating to descent of land better than any mere treatise.

Equitable estates are subject to the same rules of descent as legal estates.—*2 P. Wms.* 668.

If an eldest son be an alien born, he has no inheritable blood in him, so that in that case the younger son born within the king's allegiance shall have land by descent from his father, and not the elder son.

Descent by Custom is, that sometimes the land shall descend to all the sons, or to all the brothers, where one brother dies without issue, as in gavelkind in the county of Kent; and until the time of William the First, called the Conqueror, this was said to be the general descent of the lands all over England.

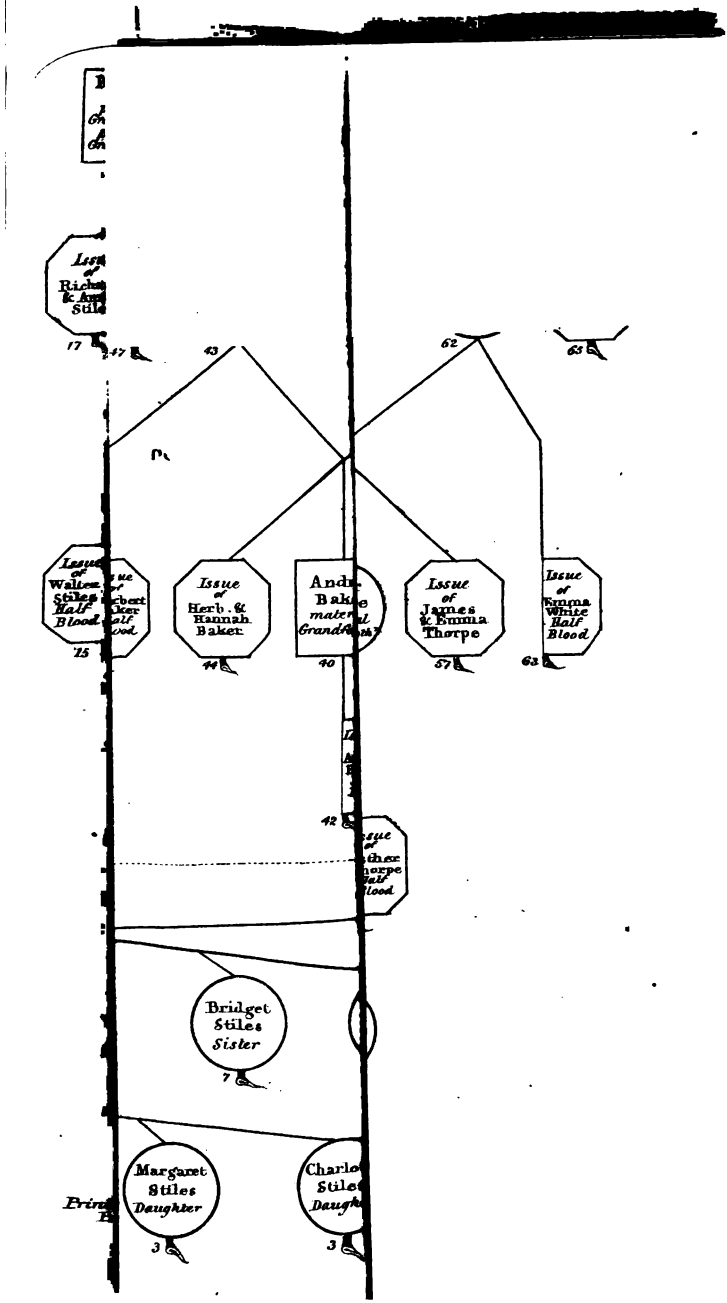
Sometimes lands descend to the youngest son, as by the custom of borough English; and sometimes to the eldest or youngest daughter, according to the particular customs of places.

Wherever an heir takes that land, &c. which his ancestor would have held and taken if living, he shall have it by descent, and not by purchase.

But where an estate is given and devised to the heir, attended with a charge, as to pay money, &c. in that case he holds by purchase, and not by descent.

One is in by purchase when he comes to lands by legal conveyance, either for some consideration or by gift, and not as heir at law; whereas descent from an ancestor cometh of course by act of law.

If one who is heir takes lands by purchase, the lands


Issue of Walter Stiles & Half Blood
Issue of Herb. & Hannah Baker
Andr. Bake maternal Grandfa
Issue of James & Emma Thorpe
Issue of Emma White Half Blood
Bridget Stiles Sister
Margaret Stiles Daughter
Charlo Stile Daugh
17
43
62
63
15
44
40
57
42
7
3
3

are not assets in his hands to pay debts, &c. which if he had come to them by descent, they would be.

Every common *purchaser* of lands must, at his peril, take notice of the estates and charges which are upon the lands; for the law presumes that no man will purchase lands without advice of counsel.

SECT. 3.—*Of the Distribution of Personal Property.*

When a person dies without having made any will, he is said to die *intestate*. In this case the law takes care to appoint an administrator of his estate, and also directs how it shall be disposed of.

In ancient times the king, on such an event, took possession by his officers of the effects, which were applied to bury the deceased, to pay his debts, and to provide for his wife and children, or if none, for his next of kin.

This power was afterwards vested by the crown in the prelates, under the notion that they were capable of disposing of the property most for the benefit of the deceased's soul.

Afterwards by the stat. 21 *Hen.* 8, c. 5, the ordinary was empowered to grant administration to the widow, or next of kin, or both, or either of them; and in case two or more of the same degree of kindred applied, he might elect whichever he pleased.

The husband has a right to administration of his wife's effects.

If he die before grant, his executors or administrators are entitled before the wife's next of kin.

Of the effects of the husband, the Ordinary is to grant administration to the widow, or next of kin, or to either or both, at his discretion.

If she renounce, then to the children, or other next of kin, in preference to creditors.

The next of kin are such as are related by *consanguinity*, that is, relations by *blood*, and not by *affinity*. Again, consanguinity is *lineal* or *collateral*.

Lineal consanguinity, is where one is descended in a direct line from the other, as father, son, grandson, &c., descending; and father, grandfather, &c., ascending.

Every generation in this direct line constitutes a different degree, reckoning either upwards or downwards.

Thus, in the table annexed (see p. 169), the father and the son of the intestate are both related to him in the first degree; his great grandsire and great grandson in the third degree.

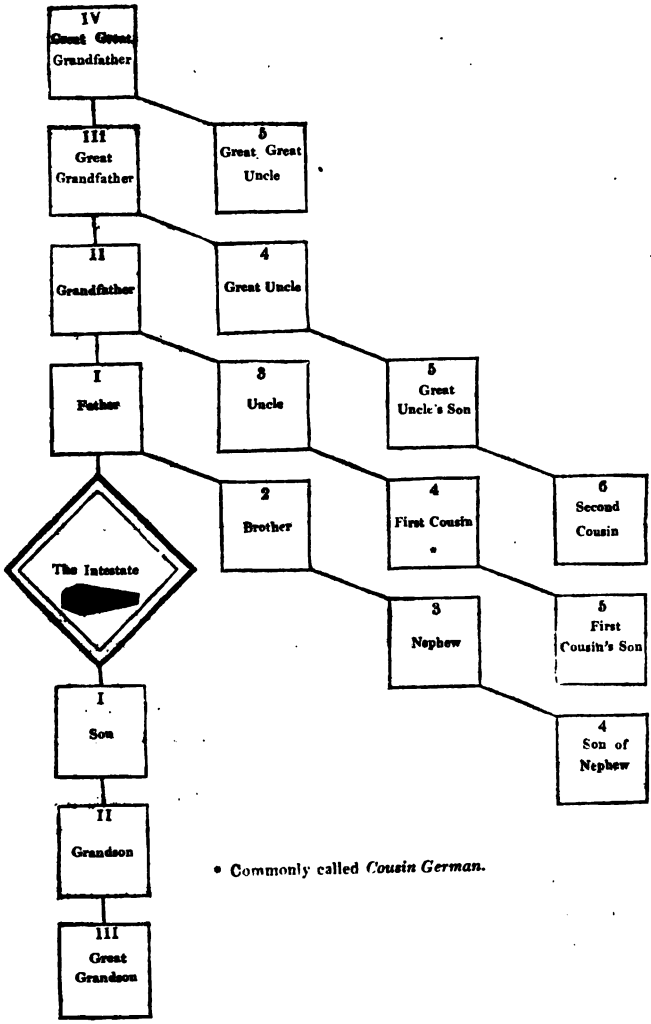
Collateral consanguinity, is where the kinsmen are all sprung from the same lineal ancestor as the deceased, but not in the same direct line with him; and, therefore, instead of being father, grandfather, son, grandson, &c., they are brothers, sisters, uncles, aunts, nephews, nieces, cousins, &c.

Thus, the father of the deceased is also *lineally* related to the deceased's brother; but they two are *collateral* kinsmen only.

So the deceased and his first cousin are *collaterally* related, because they descend from the same great grandfather.

TABLE

Of Lineal, and Collateral Consanguinity. The squares numbered in Roman figures, —represent Lineal relations; those in small figures—Collateral relations. In both cases the figures represent the degree of Consanguinity to the Intestate.



• Commonly called *Cousin German.*

In order to ascertain the degree of relationship between two persons, by the preceding table, count upwards from either of them to the common ancestor, from whom they both sprung, and then downward again to the other, reckoning a degree for each person, both upward and downward.

Example 1. In what degree was the deceased related to his brother? From the deceased to his father, (who being father to both, is the common ancestor,) count upwards, *one degree;* and from the father to the brother downwards another; making two degrees. Answer.—*Two degrees.*

2. What relation was the deceased to his cousin? From the deceased to his father, *one;* to his grandfather, *two* (who, being grandfather to both, is common ancestor); then downwards from grandsire to uncle, *three;* from uncle to cousin, *four.* Answer.—*Four degrees.*

Of the kindred, those who are nearest in degree to the deceased, are to be preferred; but among persons of equal degree, the Ordinary may make his election;

Of the next of kin, first children, on failure of them, the father of the deceased; if he be dead, the mother is entitled to administration; and though parents and children are both in the first degree, children are preferred.

Next follow brothers, (but primogeniture gives no right to preference);—then grandfathers; and though both in the second degree, the former are preferred.

Next come uncles or nephews, and lastly cousins, and the females of each class respectively.

Relations by father's and mother's side, in equal de-

gree, are equally entitled; so the half blood is admitted as well as the whole blood, and the Ordinary may, at his discretion, prefer a sister of the former to a brother of the latter.

After letters issued, the administrator is, in fact, an executor under another name. No one can be *compelled* to become an administrator.

If there be no will, the residue must be disposed amongst the next of kin, under the stat. *23 Car.* 2, c. 10, commonly called the Statute of Distributions, and which is in the nature of a will provided by the legislature for all such persons as die without having made one for themselves.

The following Table gives a clear view of the parties who, under various circumstances, are entitled to distribution of an intestate's effects after payment of his debts, and will be found practically useful.

If the intestate dies, leaving,	*His personal representatives shall take in the following proportions*, viz.:—
Wife and child or children.	One third to wife, rest to child or children; and if children are dead, then to their representatives (that is, their lineal descendants), except such child or children, not heirs-at-law, who had estate by settlement of intestate in his life-time equal to other shares.
Wife only.	Half to wife, rest to next of kin in equal degree to intestate, or their legal representatives.
No wife or child.	All to next of kin and to their legal representatives.

Child, children, or representatives of them.	All to him, her, or them.
Children by two wives.	Equally to all.
If no child, children, or representatives of them.	All to next of kin in equal degree to intestate.
Child and grand-child.	Half to child, half to grand-child, who takes by representation.
Husband.	Whole to him.
Father and brother or sister.	Whole to father.
Mother and brother or sister.	Whole to them equally.
Wife, mother, brothers, sisters, and nieces.	Half to wife, residue to mother, brothers, sisters, and nieces.
Wife, mother, nephews and nieces.	Two-fourths to wife, one-fourth to mother, and other fourth to nephews and nieces.
Wife, brothers or sisters, and mother.	Half to wife (under statute of Car. 2,) half to brothers or sisters, and mother.
Mother only	Whole, (it being then out of the statute of 1 Jac. 2, c. 17)(a)
Wife and mother.	Half to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half blood.	Equally to both.

(a) By this statute, sect. 7, "If after the death of a father, any of his children shall die intestate without wife or children in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

Posthumous brother or sister and mother.	Equally to both.
Posthumous brother or sister, and brother or sister born in lifetime of father.	Equally to both.
Father's father, and mother's mother.	Equally to both.
Uncle or aunt's children, and brother or sister's grandchildren.	Equally to all.
Grandmother, uncle, or aunt.	All to grandmother.
Two aunts, nephew, and niece.	Equally to all.
Uncle and deceased uncle's child.	All to uncle.
Uncle by mother's side, and deceased uncle or aunt's child.	All to uncle.
Nephew by brother, and nephew by half-sister.	Equally *per capita*(*a*).
Brother or sister's nephews or nieces.	Whole, nephews and nieces taking *per stirpes*(*b*), and not *per capita*.

(*a*) *Per Capita* is where the claimant takes in his *own right*, and not as a representative of another; as if the next of kin be three brothers of the intestate, A., B., and C., the effects are divided into three equal parts, one to each.—2 *Bla. Com.* 517.

(*b*) *Per Stirpes* is where persons take as *representatives;* as if the deceased had three brothers, A., B., and C., and at his death, one of them (say A.) be dead, leaving children, and B. and C. be living; the effects shall be divided into three equal parts, of which B. and C. take one each *per capita*, and the third part shall be equally divided among the children of A., who take his share *per stirpes*, as his representatives standing in his place.

Nephew by deceased brother, and nephews and nieces by deceased sister.	Each an equal share *per capita*, and not *per stirpes*.
Brother and grandfather.	Whole to brother.
Brother's grandson and brother or sister's daughter.	To daughter.
Brother and two aunts.	To brother.
Father and wife.	Half to brother, half to wife..

The following may also be gathered from the decided cases.

Mother and brother.	Equally. *Keilway* v. *Keilway*, 2 *P. Wms.* 344; 1 *Stra.* 710.
Wife, mother, and children of a deceased brother or sister.	Half to wife, a fourth to mother, and a fourth *per stirpes* to deceased's brother's or sister's children.—*Stanley* v. *Stanley*, 1 *Atk.* 458.
Wife, brother or sister, and children of a deceased brother or sister.	Half to wife, one-fourth to brother or sister *per capita*, one fourth to deceased's brother or sister's children *per stirpes*.
Brother or sister, and children of a deceased brother or sister.	Half to brother or sister *per capita*, half to children of deceased brother or sister *per stirpes*.
Grandfather and brother.	All to brother.—*Evelyn* v. *Evelyn*, 3 *Atk.* 762.

If, after the death of the intestate, his daughter marry and die before distribution made, her husband shall have the whole of the share to which he would

have been entitled in right of his wife, had she been living. But he must first take out administration to his wife's effects.

If A. die intestate, and the only issue he ever had were a son and a daughter, both of whom had married and died before him, leaving a wife and husband who had survived A., neither this wife or husband would have any part of A.'s personal estate, (though the issue of his son and daughter with his wife, if living, would have the whole,) it therefore must go to the next of kin.

If A. die intestate, without wife or child, having had only a brother and sister, both of whom had married and died before him, leaving a wife and husband who survived A., neither this wife or husband would be entitled to any part of A.'s estate, for in this case he would die without kindred, and his personal estate would vest in the *crown;* and thus it would be in respect to the husband of A.'s mother, and the husband and wife of any one of his next of kin who had married and died before him.

If a person be a subject of another country, and at his death have personal property in England, distribution is to be made according to the law of that country of which the owner was a *subject.*—*Bempde* v. *Johnstone, 3 Ves.* 198.

If a bastard or any other person die intestate, having neither wife, child, or other kindred, his effects belong to the king.

In such cases the king usually reserves a small part (it is said a tenth), and grants the rest to some one, who is thereby entitled to administer for his own benefit.

The City of *London*, the *Province* of York, and the Principality of *Wales*, have peculiar customs for the distribution of intestate's effects, expressly excepted out of the Statute of Distributions.

N.B. This section is chiefly taken from *Matthews' Law of Executors and Administrators*, a little work of the greatest practical utility and accuracy.

CHAPTER VII.

OF THE COURTS OF EQUITY AND LAW, AND SUITS AND ACTIONS THEREIN.

THE principal *Courts* of Law and Equity, for the arguing, trying, and determining of causes and suits, are the following:—

The *Chancery*, or the *High Court of Chancery*, so termed, because it is the highest court of judicature in this kingdom, except that of the Parliament.

In chancery the *Lord High Chancellor* presides, as the chief administrator of justice next to the sovereign; and is invested with the king's absolute power, governing his judgment purely by the law of nature and conscience.

There is however in the chancery an ordinary court of law, whence issue *original writs*, *commissions*, *scire faciases*, *&c.* for which this court is always open in vacation as well as term time; whereas other courts are confined to the term: it likewise holds plea of all personal actions by or against any officer of the court.

But a cause cannot be tried by jury in this court: for if the parties proceed to issue, the record is to be

sent into one of the courts of common law and tried there, after which it is remanded into chancery.

Here the extraordinary *Court of Equity* is that wherein the lord chancellor has an unlimited jurisdiction in cases of equity, which he exercises in moderating the rigour of the law, and giving remedy by way of *bill* and *answer*.

It is here relief is given to infants, notwithstanding their minority; and for or against feme coverts; all frauds and deceits are relieved, for which there is no redress at common law; breaches of trust and confidences; and accidents, as to relieve obligors, mortgagors, &c. against penalties and forfeitures.

And this court may oblige executors to give security and pay interest for money long in their hands; order the performance of a will; decree who shall have the tuition and guardianship of children, confirm title-lands, when deeds are lost; make conveyances, deficient through mistake, good and perfect; and may oblige men to come to account with each other in questions of partnership, &c.

But in suits, where the substance of them tends to the overthrow of an act of parliament, or any fundamental point of the common law, and whenever the party can have his remedy at law, he ought not to be relieved in chancery.

Also the chancery will not retain a suit generally for any thing that is under 10*l.* value, nor for lands, &c. under 40*s. per annum*, except it be in a case of charity.

Where there is any error in proceedings, there is an *appeal* to the *House of Lords*.

The *Vice Chancellor*'s Court, and that of the *Master*

of the Rolls, are also courts of equity, in which suits are determined in like manner as in the Court of Chancery. There is an appeal to the Lord Chancellor from the decree of the Master of the Rolls, and also from that of the Vice Chancellor.

The *King's* or *Queen's Bench*, is the supreme court of the common law, wherein the sovereign of England formerly sat in person, and is still presumed in law to sit there, but represented by his judges. It is still considered to follow his person, and is accordingly styled in all its processes, "the court of our lord the now king, before the king himself, wheresoever we shall then be in England."

All crimes that are against the public good, though they do not injure any particular person, are under the cognizance of this court; for it is the *custos morum* of all the subjects of the kingdom.

So that no private subject can suffer any kind of violence or injury, against his person, liberty, or possessions, but a proper remedy is here afforded him, not only for the satisfaction of damages sustained, but likewise for the punishment of the offender.—*2 Hawk. Pl. Cr.* 6.

This court is now divided into the *Crown side*, which determines criminal matters of all kinds, wherein the king is plaintiff: as treasons, felonies, murders, robberies, breaches of the peace, and all other causes which are prosecuted by indictment, or information, &c.

And a *Plea side* for trying civil causes, which holds cognizance of all actions commenced by writ of summons, &c.; as actions of debt, upon the case, trespass, ejectment, &c.

The court of queen's bench has power to regulate all the courts of law in the kingdom, that they do not exceed their jurisdictions, nor alter their forms, &c. It may reverse erroneous judgments given in inferior courts, and punish the magistrates and officers for corruption.

Into this court indictments from the inferior courts are frequently removed by *certiorari;* and it may award execution against persons attainted in any other courts, or even in Parliament, on removal of the record and their persons by a *habeas corpus.—H. H. P. C.* 139.

Likewise it grants writs of *habeas corpus* to relieve persons unjustly imprisoned; and writs of *mandamus* for restoring officers of corporations, &c. as also freemen disfranchised; and from thence issues the writ *quo warranto* against those usurping franchises and liberties against the king, to seize the liberties.

This court may commit persons to what prison it thinks fit, and bail any person whatsoever; it issues prohibitions to other courts; and may repeal the queen's letters patent by *scire facias, &c.*

The *Common Pleas,* termed otherwise *Common Bench,* is one of the queen's courts now held constantly in *Westminster Hall;* but in former times was moveable, and followed the king. But this court hath continued stationary ever since *Magna Charta,* which provided that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*"

It hath jurisdiction in all causes concerning lands and inheritances; and in personal and mixt actions, it hath a concurrent jurisdiction with the Queen's Bench.

According to Fortescue, this court seems originally

to have been the only court for real causes: but it has no cognizance of pleas of the crown; and *common pleas* are all pleas as are not such.

No persons are admitted to plead at the bar, or to sign any special pleadings in the Common Pleas, except serjeants at law.—*Rule, Hil. Term*, 1840.

The *Exchequer* is an ancient court of record in which all causes concerning the rights and revenues of the crown are heard and determined; though it is accounted the last of the four courts at *Westminster*.

In the Exchequer there are divers courts; yet the usual division of it is in two parts only, for despatch of business; one of which is chiefly conversant in the *judicial* hearing of causes, and the other, called the Receipt of the Exchequer, employed in the receiving and payment of money.

The judicial part of the Exchequer is a court both of law and equity, the court of law being held in the *Office of Pleas*, according to the course of the common law, before the barons, and where all the officers and clerks, the king's tenants and farmers, debtors and accountants, &c. are privileged to sue and be sued in like actions as in B. R. or C. B.

And the court of equity is held in the Exchequer Chamber, nominally before the lord treasurer, chancellor, or under-treasurer, and barons; but generally before the barons only, for the lord chief baron is the chief judge.

In this branch of judicature the proceedings are by bill and answer, according to the practice of the Court of Chancery, with this difference, that the plaintiff must set forth he is debtor to the king, whether he be so or

not: and the complaint is always concluded with a fiction, that he is, by the injury of the defendant, the less able to pay the king the debts which he owes him at his said exchequer.

It is in this court of equity our clergy usually exhibit bills for the recovery of their tithes, &c. The queen's attorney-general also here brings bills for any matters concerning the crown; and a bill may be exhibited against the attorney-general by any person grieved, in any cause prosecuted on behalf of the queen, to be relieved therein.

The leading process here is the writ of *subpœna*.

For difficult matters in law there is a Court of *Exchequer Chamber*, where all the judges are assembled, and into which causes are *adjourned* when there is a writ of error sued out against the judgment of any of the courts of common law.

It is also in the Court of Exchequer Chamber where crown cases reserved for the opinion of all the judges from the various circuits, are heard and determined.

The *Court of Bankruptcy* was established under the provisions of the statute of 1 & 2 *Will.* 4, cap. 56; and consists of a chief and three other judges of that court, which is declared to be a court of record; and also of six commissioners.

The judges of this court may form a court of review to control and determine all matters in bankruptcy, in like manner as the Lord Chancellor formerly did.

The commissioners individually attend to the early proceedings in fiats of bankruptcy, and sit in different courts.

There are two subdivisional courts of the commis-

sioners, to whom application may be made by petition, motion, or special case, according to the rules and regulations laid down by the act above referred to.

The *Insolvent Debtors' Court* was also created by act of parliament, which authorized the king to appoint a chief and two other commissioners, being barristers at law, as judges thereof.

This court is a court of record, and the commissioners hear and determine all cases before them upon petition of the insolvent debtors, and either grant the debtors their liberty, or remand them, or dismiss their petition, and in many instances adjudge them to be imprisoned for terms not exceeding three years, according to the several cases.

The *Assizes* are the courts where the writs and processes of *assize* are taken before an assembly of knights, and other gentlemen, with the judge or justice, in a certain place, and at a time appointed.

In respect to which, all the counties in England are divided into six circuits, and two judges are commissioned to go each circuit, who hold their courts of assizes twice a year in every county except Middlesex, and try and determine causes both civil and criminal. In Middlesex and London causes are heard and determined at the nisi prius sittings after each term.

There are also two Welsh circuits, one judge only being commissioned for each, to hold courts of oyer and terminer in the spring and summer.

By commission of *oyer* and *terminer* directed to the judges and many other gentlemen of the county, and a commission of *gaol delivery*, they are authorised to try

treasons, felonies, and every prisoner in gaol, committed for any offence whatsoever.

And by their commission of *assize* they are empowered to take assizes, and do right upon writs of assize brought before them by such persons as are put out or disseised of their lands and possessions; but this is now usually done by ejectment.

Also by commission of *nisi prius*, civil causes, drawn to issue, are brought down in the vacation, and tried at the assizes by a jury of twelve men of the county where the cause of action arises, before the day of appearance appointed for the jury above.

This is ordained for the ease of the parties, jury, and witnesses; and on return of the verdict given by the jury to the court above, the judges there give judgment.

Where causes are too difficult for the judges of assize, they shall be referred to the justices of the bench to be ended.

The *County Court:* this is the chief of the *inferior courts*, and is a court kept by the sheriffs of every county, being divided into two kinds; one retaining the general name, held monthly by the sheriff or his deputy:

The other called the *Tourn*, which is held but twice a year, viz. within a month after Easter and Michaelmas; and after this is the queen's *Leet* through all the county, to inquire of treasons, felonies, and breaches of the peace, &c. and punish offences: it is a court of record, of which the sheriff is judge.

It is observed that before the courts of Westminster were erected, the county courts were the chief courts

of the kingdom; and in former times had the cognizance of great matters, as appears by Glanvil and other writers, till they were reduced by *Magna Charta*.

But the county court still retains the determination of certain trespasses and debts under 40*s*. And by virtue of a writ of *justicies* the sheriff may hold plea of debt and other personal actions above that sum; for this writ is in the nature of a commission to him to do it.

By *Recordari, &c.* causes are removed out of this court into B. R.

The *Court Leet* is a court of record, ordained for punishment of offences against the crown, and is said to be the most ancient court in the kingdom.

This court is incident to an hundred, as a court baron is to a manor; and it inquires of all crimes and offences under high treason; but such as are punished with loss of life or member are only inquirable and presentable here, and to be certified over to the justices of assize.

Anciently this court was called the *view of frankpledge*, because the king was there certified by the *view* of the steward how many persons were within every leet, likewise persons were here bound with sureties or *pledges* for their truth.

All persons above the age of twelve years, having remained within the leet for a year and a day, may be sworn to be faithful to the king by our old laws; and the people are to be kept in peace, &c.

And every one from that age to sixty is obliged to do suit in this court, except peers, clergymen, &c.; and unless they are liable to appear at the sheriff's tourn.

The steward is the judge of the leet, which ought to

be held twice every year, in like manner as the tourn; but sometimes it is kept only once a year, and that by custom is good. And here the steward has power to elect officers as constables, tithingmen, &c. as well as punish offenders.

In this court the usual punishment is by fine and amercement; the former assessed by the steward, and the latter by the jury, being twelve freeholders or *resiants*, and for both of which the lord may have an action of debt, or take a distress.

The *Court Baron* is a court that every lord of a manor has within his own precinct: and in ancient times the lords of manors are styled *barons*.

It is held by prescription, and is of two natures, viz. by the *common law*, which is the *Freeholders' Court*, of which the freeholders being suitors are the judges; and by *custom*, which is called the *Customary Court*, and concerns the customary tenants and copyholders, whereof the lord or his steward is judge.

A court baron may be of this double nature, or one may be without the other.

In the freeholders' court, that may be held every three weeks, they have jurisdiction in trying actions of debt, trespass, &c. under 40*s*., but on recovery of a debt they cannot make execution, as other courts may, but must distrain the defendant's goods, and keep them till satisfaction is made.

It is in the customary court baron that copyhold and customary estates are passed by surrenders, admittances, &c. But this court is usually held only once or twice a year along wish the court leet, unless

it be on purpose to grant an estate, in which case it is held as often as requisite.

Here the *homage* jury of copyholders inquire that their lords lose not their services, duties, or customs, but that the tenants do their suits of court, pay their rents and heriots, &c.

They also present the deaths of tenants, surrenders of estates, and all trespasses, &c.

By certain local acts, courts are appointed within certain limits, to try, by the summary inquiry of certain householders, of the truth of pleas under *5l.*, called *Courts of Conscience*, and persons suing for such demands in the superior courts will be liable, although they succeed, to pay the defendant his costs of suit, upon a suggestion that the cause was under *5l.* and ought to have been tried below.

SECT. 2.—*Of the several Forms of Actions prosecuted in the Courts of Law.*

The *Action of Assumpsit* is a form of action at law whereby a compensation in damages may be recovered for the injury sustained by the non-performance of a parol agreement.—*Selw. N. P.*

Agreements are distinguished into agreements by specialty and agreements by parol, and the law of England does not recognize any other distinction.

If agreements are merely written, and not specialties (that is, under seal), they are parol agreements.

The action of assumpsit is confined to agreements by parol, the action of covenant or debt being the proper remedy for the non-performance of agreement by specialty.

Every promise upon which an action of assumpsit may be maintained for its non-performance, must be founded on a sufficient consideration, that is, a consideration of benefit to the defendant, or benefit to a stranger, or of damage or of loss sustained by the plaintiff, at the request of the defendant.

This action may be brought to recover damages upon breach of promise of marriage, upon non-performance of an award, upon attornies', apothecaries', and tradesmen's bills, for the recovery of servant's wages, for not accepting or not delivering goods, for goods sold and delivered, for work and labour, for money paid or lent, for interest, and also on an account stated.

The *Action of Debt* is a suit given by law where a person owes another a certain sum of money, on bond, or contract for a thing sold, which the debtor refuses to pay at the day agreed; then the creditor shall have this action against him to recover the same.

And where money is due upon any specialty, that is by deed under hand and seal, this action and no other lies, except upon covenants under seal.

Here if a person acknowledge by deed, that he has so much of another's money in his hands, an action of debt will lie for it; also where one owes money to another, who hath his note without seal, action of debt will also lie.

Action of debt is generally prosecuted on a bill, bond,

or lease, &c. And in debt on single bill, a defendant may plead payment before the action brought, in bar thereof; and on bond, he may bring in the principal, interest, and costs, pending the action, and thereupon be discharged.—*4 & 5 Anne*, c. 16.

The *Action upon the Case* is a general action that is given for redress of wrongs and consequential injuries, done without force, and which by law are not provided against.

It is said to have its name on account of the whole cause or case being set forth in the writ, and there is no other action adapted to the case.

By statute it is ordained, that this action shall be had rather than any persons shall depart the king's courts remediless; wherein there may be the like process, as in actions of debt or trespass.—*13 Ed.* 1.

In general, action on the case lies for *nonfeasance*, where a person omits that which he ought to do according to promise, to the damage of another; and for *malfeasance*, when one does something which ought not to be done; and *misfeasance* where a thing is undertaken, or the law requires a person to do it, and he doth it otherwise than he should.

The actions are as various under these heads as the torts and injuries upon which they are founded.

For deceits in contracts, bargains, and sales; as where one sells another adulterated wine, corn full of sand or gravel, wares by false weights or measures, &c.; warrants a horse to be sound, or clothes to be of such a length, and they are not so, action upon the case will lie.

So for any private nuisance or annoyance to a per-

son's house, water way, light, or air, by building, diverting, stopping, &c., whereby he is endamaged.

The *Action of Account* is an action that lies against a person who, by reason of his office or business undertaken, is to render an account to another, but refuses to do it; as a bailiff or receiver to a lord and others.

This action is now not so much used as formerly, there being no damages given by it.

The *Action of Covenant* is such as is brought where a man is bound by covenant in a deed, entered into by him and other persons, to do or not to do some act or thing agreed between them, when he hath broke the same.

A person makes a lease for years, and then turns the lessee out of the lands, he may have action of covenant against the lessor, though there be no express covenant in the deed.

Yet, in case a stranger enters before such lessee, he shall not have an action upon this *ouster*, because he was never a lessee in privity to have covenant.

Action of covenant lies on a bond, for it proves an agreement; though when only a hand is to a writing, and no seal thereto, covenant does not lie, but action of the case upon breach of the agreement.

The *Action of Detinue* is an action that lies against one who has goods or other things delivered to him to keep, and he afterwards refuseth to deliver them.

For any thing certain and valuable, wherein one may have property, detinue will lie; in which action, the specific thing detained is generally recovered, and not

damages; though if a man cannot recover the thing itself, he shall recover the value of it in damages, and also for the detainer.

If on the delivery of goods, the person to whom they are delivered dies, action of detinue may be brought against his executors, or any one to whose hands they come; and where the goods are delivered over to another, this action shall be immediately had against the second person.

And notwithstanding the party deliver the things to a person that has a right to the same, yet it is said he is chargeable.

A man may likewise have a general detinue against one that finds his goods; but if, before the owner brings his action, the finder sells them, or they are recovered in execution, &c. he cannot bring detinue.—*Fitzherb.*

There is an action for detinue that lies for *deeds and charters*, which make the title to lands, and here the defendant shall not wage law, nor in trover and conversion, though in a common action of detinue he may do it.—2 *Inst.* 107.

The *Action of Trover and Conversion* (which comes from the French *trouver*, *invenire*), is a special action on the case, that lies against a person, who, having found another's goods, refuses to deliver them upon demand.

Or it is where a man has in his possession the goods of another by delivery to him, or otherwise, and the person so possessed converts them to his own use without the owner's consent.

And this action lies for the recovery of the damages to the value of the goods, &c.

It is called trover and conversion because the plain-

tiff in the action surmises that he lost such and such goods, and that the defendant found them, and at such a place converted them to his own use.

But here the losing is only a mere suggestion, and is no respect material.

If a person finds goods, and doth refuse to deliver them to the owner on demand, this is evidence of a conversion in law; yet he may answer, that he does not know whether the person demanding is the right owner or not, and then it is held to be no conversion.

Although a defendant tenders the goods or things after a demand and refusal made, or even if they come into the plaintiff's possession, neither of these things will purge the former wrong, or make satisfaction to the plaintiff for detaining of the goods.

For that shall only go in mitigation of the damages, but not to the right of the action of trover, which the party is still entitled to.

In case one puts out his cattle to pasture, and then sells them, the buyer may have action of trover against the farmer, &c. if he refuses to let them go till paid for.

Here the farmer's remedy must be had by action for what is due to him for depasturing the cattle.

And he may not detain them for the debt, as in the case of an innkeeper, or tailor, &c. for things in their custody.—*Cro. Car.* 271, 272.

The *Action of Slander* is an action on the case brought for words whereby a person is injured in his reputation.

And for any words spoken of another which affect his life or liberty, office, trade, or tend to his loss of preferment in marriage, or service, or to his disinhe-

riance, or which occasion any particular damage, this action lies.

So it is when words are in general maliciously spoken of a person, for which, if true, such person might be punished.

But if the words are spoken in prosecuting a cause in an ordinary course of justice, as where a lawyer in pleading shall utter any words according to his instructions, those words will not maintain an action.

Also, in other cases, if the defendant can make proof of the words, he may plead as a special justification that they are true. So he may plead that he spoke them on the authority of another person whom he named at the time.

If a person be prosecuted by way of information for a *libel* against another, it is not material whether the matter be true or false, he shall nevertheless be punished. —*Hob. 253.* "*Lubricum linguæ non facile in pœnam, &c.*"

The *Action of Assault and Battery* is an action of trespass against a man's person, where any injury is done to another in a violent manner: and such offence is also indictable, though it is usual not to prosecute an indictment, but to bring this action only for damages.— *Termes de Ley.*

But if a person be assaulted or beaten, and he hath no witnesses to prove the fact, the party, instead of his action for the battery, may bring an information in the crown office against the aggressor, and there he shall be fined to the king. And it is held that the least touching of another person in anger, is a battery, which may be committed either by pushing, jolting, or fillip-

ping upon the nose, &c.; and spitting in a man's face, is battery, if not done by accident.

The laying hands gently on one is not battery to found an action; the law will not presume any damage in such case, and the defendant may justify *molliter manus imposuit.*

If a person is beaten by another, he may likewise return it, and plead that the plaintiff's battery was occasioned by his own first assault (*son assault demesne*), whereupon the defendant shall go quit, and the plaintiff be amerced.

For the battery of a person's wife, child, or servant, the husband, father, or master, shall have this action.

The *Action of Trespass* is that action which generally lies for any wrong or damage done with force and arms by one private man to another; and it is sometimes against the person, and sometimes against his lands and goods.

An action of trespass lies where any one makes an entry on another's lands, and there does damage; also *trespass vi et armis* may be brought by a person who has the possession of goods, or of a house or land, if he be disturbed in his possession.

To enter into a house against the will of the owner, is a trespass for which an action lies; but a man may lawfully come into the house of another, to demand money, &c. yet it has been held, that if a person has a horse in another man's ground, and he enters therein to take it away without leave, action of trespass lies against him.

And this action will lie for breaking a person's close or ground, or driving a cart and horses over his land, where there is no way for it; for eating corn of another

with cattle, cutting of trees on the land, or damaging the grass.

So where one breaks the doors, windows, &c. of another's house, or fences of lands; or chases cattle by which means they die, or are injured; or if he fish in another's pond; or pluck up garden herbs and roots; or tear a bond, or other writing, &c.

Though if the jury do not give 40*s.* damage in trespass, the plaintiff shall have no more costs than damages; unless the title of the land come in question, or something of the plaintiff's be carried away, &c. stat. 22 & 23 *Car.* 2, c. 9, s. 136; or the judge will certify, that the trespass was wilful and malicious.

The *Action of Waste* was an action which formerly was brought where any waste or destruction was made either in houses, lands, or woods, &c. by tenant for life or years, to the damage of the heir, or him in reversion or remainder.

As if any such tenant pulled down the house, or willingly suffered it to fall, or to be uncovered, or in decay, and did not repair the same in due time: or,

If he cut down timber trees on the land with an intent to sell them, or for any other purpose but for repairs; or in case he cut young trees for reparations, when there was other timber; or green wood, if there was dry; or more fire-bote than was necessary:

Or in case he digged mines of metal or quarries of stone, &c. without power by express covenant, or destroyed deer in a park, doves in a dove-cote, or fish in a pond, &c.

In all these cases the heir of the land, or the person in reversion, may have an action for waste, and shall

thereon recover the place where such waste is committed, with treble damages.

The action of waste had long fallen into disuse, when this action was finally abolished by the statute of *3 & 4 Will.* 4, c. 27.

An action on the case in the nature of an action of waste has been substituted for the ancient remedy, and it will also lie between persons between whom the proper action of waste was not maintainable.

And before any waste is done, any party who is interested in a reversion or remainder may have an *injunction* out of chancery to stay the waste.—*Fitzherbert.*

The *Action of Ejectment* is now the common action for trial of titles, and recovering of lands, &c. illegally held and kept from the right owner.

For it is become an action in the place of many real actions, such as writs of right, *formedons*, &c. which are now abolished by statute, and were always very difficult as well as tedious and expensive.

There is no arrest required in this action, as now generally prosecuted; but if there be not a tenant in possession, as where a house or land is empty, and no person can be found to whom the declaration may be delivered;

In that case the plaintiff must proceed by sealing a lease upon the land, &c. And an original writ is to be sued out against the person who ejected the lessee, and then ouster and ejectment, &c.

The usual course of proceeding in ejectment is to draw a declaration only, and feign therein a lease for three, five, or seven years, by him that would try the title, and also feign a casual ejector or defendant, who

serves a copy of the declaration on the tenant in possession;

And at the same time gives notice at the bottom, for him to appear and defend his title, or that he, the feigned defendant, will suffer judgment by default, whereby the true tenant will be turned out of possession of the lands.

To this declaration, the tenant is to appear the beginning of the next term by his attorney, and consent to a rule to be made defendant instead of the casual ejector, and takes upon him the defence, wherein he must confess the fictitious *lease*, *entry*, and *ouster*, and at the trial stand upon the title only.

But if the tenant in possession does not appear, and enter into the said rule in time, after the declaration served, then, on affidavit being made of the service of the declaration, with the notice to appear as aforesaid, the court will order judgment to be entered against the casual ejector by default, and thereupon the tenant by writ is turned out of his possession.

In case such tenant appears to the action, having by his attorney filed common bail, and entered into the rule aforementioned, he is made defendant in the declaration, and put into the place of the ejector.

And then the defendant's attorney must plead *not guilty*, and the attorney for the plaintiff draws up the issue in the cause, a copy whereof and of the declaration is to be delivered to the attorney for the defendant, whereupon notice is given of trial.

In order to which, the writ of *venire*, *&c.* is to be made out and returned, and the record made up by the plaintiff's attorney beginning with the declaration; then the *brevíate* of the cause is to be prepared, in which, after a short recital of the declaration and plea, the

plaintiff's title is to be set forth from the person last seised in fee of the premises, under whom the lessor claims down to the client, the plaintiff proving the deeds, &c.

And after trial the proceedings are as in other cases.

By a late statute, those tenants to whom declarations in ejectment are delivered for any lands, &c. are to give their landlords notice thereof on pain of forfeiting three years' rent.

And the court where such ejectment shall be brought may suffer the landlord to make himself defendant, by joining with the tenant, if he appears: but if he does not, judgment shall be signed.

Though in case the landlord desires to appear by himself, and consents to enter into the like rule as the tenant, if he had appeared, ought to have done; the court shall permit him so to do, and order a stay of execution, &c.—11 *Geo.* 2, c. 19, s. 13.

And by stat. 4 *Geo.* 2, c. 28, s. 2, where half a year's rent is in arrear, the landlord is allowed to serve a declaration in ejectment without a formal demand of the rent or re-entry.

The plaintiff in ejectment recovers only according to the right which he has at the time of bringing his action; and on his recovery by verdict, he may have an action of trespass to recover the mesne profits of the land from the time of the defendant's entry laid in the declaration.

And if judgment should be against the plaintiff, he can bring another action of trespass and ejectment for the lands, it being only to recover possession, &c.

But in personal actions, as debt, &c. a judgment once recovered is perpetual; for the plaintiff can have

no action of a higher nature, but his only remedy is by writ of error; and sometimes in chancery.

After twenty years' adverse possession, the party having a mere right of possession is barred of this action altogether. *Vigilantibus non dormientibus leges subveniunt.*

SECT. 3.—*Of Proceedings in Courts of Equity.*

A *Suit in Equity*, in its most comprehensive sense, is defined to be the form of application to the judicial power of the courts of equity for the redress of injuries alleged to be sustained.

The first step in commencing a suit in chancery is to *file a bill.*

A bill is a petition in writing addressed to the Lord Chancellor, wherein the petitioner sets forth the subject of complaint, and adds such circumstances by way of allegation (which are technically called "*charges*") as tend to corroborate his statement, or to anticipate and controvert the claims of his adversary, and finally he prays such relief as the nature of his case demands, and also process of subpœna against the defendant to compel him to answer upon oath to all the matters charged against him in the bill.

The *first* part of a bill in equity contains the address of the bill to the Lord Chancellor, or other person or persons who have the custody of the great seal.

The *second* part contains the names and descriptions of the plaintiffs.

The *third* part is termed the *stating* part of the bill, which consists of the plaintiff's case, or in other words, the facts upon which he rests his title to relief.

The *fourth* part consists of a general charge of confederacy against the defendant.

The *fifth* part consists of allegations of the defendant's pretences and what are called *charges* in corroboration of them.

The *sixth* part consists of an averment that the acts of the defendant complained of are contrary to equity, and that the only complete remedy is through the mediation of a court of equity.

The *seventh* part consists of interrogations, and a prayer that the defendants may answer the matters alleged against them in the bill.

The *eighth* part contains the prayer for relief.

The *ninth* part consists of a prayer of process, that is, that a writ of subpœna may issue against the defendant to compel him to answer upon oath to all the matters charged against him in the bill.

Bills and other pleadings in chancery are usually drawn by junior counsel, who, from the circumstance of their devoting a great portion of their time to drawing draft pleadings in equity, are denominated *equity draftsmen.*

When counsel has drawn the draft of the bill and signed it, (for no bill can be put on the file of the court without being previously signed by counsel,) the solicitor gets it engrossed on parchment and takes it to his clerk in court, who, after entering it in a book, files it, from which time it is said to be a record of the court, and bears date from the day on which it is brought into the office.

The clerks in court are officers to the number of six, (thence termed the *six clerks*,) through whom a great portion of the business of the court is transacted, especially that relating to the pleadings.

The bill having been filed, the next step for the plaintiff's solicitor is to sue out a writ of *subpœna to appear and answer*, which is a process issuing out of and under the seal of the court, directed to the defendant, commanding him to appear and answer the bill.

A copy of the subpœna is then *served on* the defendant, who on such *service* is obliged to appear within four days, or if a country cause, within eight days.

If the defendant refuses or neglects to do so, he is said to be in *contempt*, and the court awards certain process against him, thence called *process of contempt*.

The defendant either *voluntarily* or by means of the process above described, *appears*, his appearance being effected by his solicitor instructing his clerk in court to appear to the bill in due form.

The defendant then constructs his defence to the bill, and this defence, according to its nature, will either be what is termed a *demurrer*, a *plea*, a *disclaimer*, or an *answer*.

A *demurrer* is a defence by showing some defect on the face of the bill itself, or in the matter contained in it; as in the case of a bill not being framed correctly; or in case of the facts therein stated being insufficient to found a decree upon; or in case the plaintiff on his own showing appears to have no right.

A *plea* is that mode of defence by which a defendant endeavours to state some new fact as a reason for the cause being dismissed, delayed or barred: as a plea to

the *jurisdiction*, which endeavours to show that the court has no cognizance of the cause; or by showing some matter in *bar* of the suit, and in consequence of which the plaintiff can demand no relief.

A plea therefore is not like a *demurrer*, a defence arising from some defect on the face of the bill itself, but a defence arising out of new matter brought forward by the plaintiff.

A *Disclaimer* is a mode of defence which a defendant resorts to when he has no interest or concern in the subject-matter of the suit, and defends himself by *disclaiming* all right or title thereto, and prays the court to dismiss him accordingly.

An *Answer* is the most usual defence of all those enumerated, and is that by which the defendant controverts the case stated by the plaintiff, or denies some parts of it, or admits the case as stated by the plaintiff in his bill, and submits to the judgment of the court thereon.

A *Replication* is nothing more than a general reply to the defendant's answer, and by which he avers his bill to be true, and the defendant's answer to be directly the reverse, and which he is ready to prove as the court shall award.

Upon this the defendant *rejoins*, averring the like on his side, and hence issue is joined upon the facts in dispute.

This brings the *pleadings* to a termination, and the next step is the *examination of witnesses* upon the facts in dispute between the parties.

When the parties have arrived at issue, the next step is for them to collect the best evidence they can in support of their respective cases.

For this purpose they instruct their counsel to prepare *interrogatories* for the examination of their witnesses.

In Chancery the witnesses of the respective parties are not examined *vivâ voce* in open court, as at common law, but upon *written interrogatories*, framed by counsel and submitted to the witnesses out of court, and their answers or *depositions* taken in writing.

When these interrogatories are engrossed on parchment, they are left to be filed with an officer of the court termed an *Examiner*, who examines the witnesses upon the interrogatories before him.

When the witnesses reside beyond the distance of twenty miles from town, their examination, instead of being taken before the examiner, is taken before four commissioners appointed for that purpose, who proceed to examine the witnesses upon interrogatories in the same manner as has been already described.

When all the witnesses have been examined, the depositions made to the interrogatories by the witnesses are kept private, until the time of *publication* as it is termed, that is, until the time arrives when they are permitted to be made public.

Publication passes, that is, they are made public, by a rule of court for that purpose, which is thence termed a *rule to pass publication*, after which the depositions are open for the inspection of all parties.

When publication has passed, the parties usually take copies of the depositions, and the cause is in a proper condition to be set down for hearing; and accordingly

either the plaintiff or defendant may procure the cause to be so set down.

When the cause has thus been set down for hearing, the next step is to sue out a *subpœna to hear judgment*, to be served on the opposite party, in order that he may attend in court on the hearing of the cause to hear the judgment of the court; for the court is unwilling to pronounce its decree in the absence of any of the parties to be affected by it.

When the cause comes on it is conducted in the following manner: The pleadings are opened by the junior counsel of the plaintiff, after which the senior counsel on the same side goes fully into the case, stating the matters in issue between the parties, and the points of equity arising therefrom, after which the evidence in support of the plaintiff's case is read; that is, the depositions of his witnesses, the admissions made by the defendant's answer (if any), and any *exhibits* that may be necessary are produced.

On the plaintiff's counsel having concluded their arguments, the defendant's counsel then addresses the court, and brings forward his evidence in much the same manner as the plaintiff has done; after which the plaintiff's counsel is heard in reply, and this concludes the argument on both sides.

After the court has heard the argument on both sides, it then proceeds to pronounce its sentence or *decree*, which is the order of the court pronounced on hearing and understanding all the points in issue between the parties, and determining all the rights of the parties in the suit according to equity.

The *decree* may be considered as the completion of

the suit, and all that remains to be done is the carrying it into execution.

In many instances a compulsory process to compel a party to perform a decree is not requisite, as parties frequently, and indeed generally, obey it voluntarily.

When, however, the act decreed to be done is endeavoured to be evaded, it is then necessary to resort to some compulsory process in order to compel him to perform it.

Accordingly a *writ of execution of the order* (that is, a writ commanding the party to execute or perform the terms of the order) is obtained, and a copy thereof served on the party against whom the decree is to be enforced.

If the party disobeys this writ, which is issued under the seal of the Court, he is then in contempt, and the ordinary process of contempt is then to be resorted to in order to enforce the decree.

For a more complete summary of the proceedings in the courts of equity, see *Holthouse's Law Dictionary*, an essential assistant to law students in every branch of the profession.

SECT. 4.—*General Proceedings in Trials of Cases in the Courts of Common Law.*

The mode of commencing an action in the courts of common law is by issuing a *writ of summons*, which is a judicial writ, proceeding out of the court where the action is brought by the plaintiff; this writ is directed

to the defendant, and peremptorily commands him to appear on a day mentioned therein in court, &c.

The mode of issuing a writ of summons is simply by taking it to the proper officers, and getting it signed and sealed, which are done as a matter of course on payment of the fees.

When the writ is issued, a copy of it is made, and such copy is served upon the defendant.

After service the party serving it testifies to his so doing, by making an indorsement of the time, &c. on the back of the writ.

The next step is the *Appearance* of defendant to the action in court to enable the plaintiff to make his allegations in due form; this is done by his attorney entering an appearance on the books of the court.

But should the defendant fail to enter such an appearance, as by law he is required, then the plaintiff by his attorney is entitled to enter an appearance after the time has elapsed, within which the defendant ought himself to have appeared.

This step is however only taken where service of the copy of the writ has been made on the defendant.

If an attorney undertakes to appear for his client, the court will compel him thereto, and to put in common bail; after an appearance or common bail entered and filed, the plaintiff declares against the defendant.

The *Declaration* is a formal setting forth in writing of the ground of complaint of the plaintiff in the action against the defendant, as the non-payment of the debt upon request, &c. And the plaintiff has two terms after the return of the writ to exhibit his declaration,

that term being accounted one wherein the writ was returnable; but in bailable actions they were reckoned from the putting in and perfecting special bail.

The *Plea* is the defendant's answer to the plaintiff's declaration; though in a more extensive sense, *pleading* contains whatever either party alleges for himself in the cause depending.

A plea is either *general*, and enters into the merits of the cause, being a general answer to the declaration, as in debt on contract, that he the defendant owes nothing; or it is *special*, and sets forth the matter at large, as discharge, release, accord and satisfaction.

The special plea is drawn up in form and signed by counsel, or it will not be received; but a general plea need not be signed by counsel: and every plea must be pleaded either in *bar* to the action brought, or in *abatement* of the writ on which the action is framed.

If a plea fails in answering all the plaintiff's charge or matter alleged, the plaintiff shall have judgment as for want of plea. If the plea be not a sufficient answer in law to the cause of action, the opposite party *demurs*, *i. e.* prays the judgment of the court on its sufficiency. If the ground of demurrer is apparent on the face, it is a *general demurrer;* where only informal, or rendered insufficient by extrinsic matter, such causes must be alleged, and it is then a *special demurrer.*

But when a defendant pleads a bad plea, if issue be joined thereon, and a verdict is given for the defendant, the plaintiff shall not take advantage of the insufficiency of the plea, to which he ought to have demurred.

Where process is returnable the first or second returns of terms, the defendant is to plead in four days, if he lives within twenty miles of London, and if farther off in eight days, after delivery of the declaration, with notice to plead, &c., and that without *imparlance*, or craving a further day to advise; or making default, the plaintiff may sign his judgment, by late orders of court.

The defendant having pleaded to the plaintiff's action and declaration; to such plea, the plaintiff may make a *replication* or answer; and to that there may be a *rejoinder* by the defendant, till the parties are at issue in the suit on some single point.

The *Issue* signifies the point or matter which issues forth of the allegations and plea of the plaintiff and defendant, which is to be tried by a jury of twelve men.

And in every issue there ought to be an affirmative on the one part, as that the defendant is indebted to the plaintiff in a certain sum, &c. And a denial on the other part, that the defendant does not owe the debt or money charged, &c.

For there must be ever a negative and affirmative of it, to make a right issue; it is also observed, that without issue joined there can be no good trial, nor ought judgment to pass.

When the parties have thus proceeded to issue, the attorney for the plaintiff makes a copy of the issue and delivers it to the defendant's attorney, with notice of trial: in order whereto, a writ of *venire facias* must be issued, and a *distringas* to the sheriff to return the jury, and the record is made up for trial.

The *Trial* is the examination of the cause before a

judge and jury, and trying of the question or point in issue between the parties, by the facts adduced in evidence, whereupon a verdict and judgment is given.

To proceed in the trial at the *assizes*, when a cause comes on, the *distringas* of the jury is to be first returned by the sheriff, and then the record must be delivered to the judge's marshal; upon which the counsel being instructed with their briefs, &c., and all parties ready, the marshal gives the record to the judge, and the crier calls over the names of the jury.

The persons to serve on a *jury* are to be freemen, and indifferent, no ways interested in the cause, and not outlawed or infamous; neither ought they to be aliens, or men attainted of any crime, or be infants, persons of seventy years of age, &c. They are likewise to have 10*l. per annum* freehold, and be returned from the county where the fact arises, or is alleged to have arisen in the declaration.

And to the jurors there may be a challenge, or exception taken, before they are sworn, on account of favour or affinity, or their having been convicted of felony, &c., or where any one of them has given a verdict before in the same cause, matter, or title.

After the jury are sworn, being first elected by ballot, according to the statute, they are bid to stand together, and hear their charge; on which the counsel on both sides open the case, first on the side of the plaintiff, as the proof lies on him, and looking over their briefs, they argue the matter in controversy, producing witnesses to prove what they allege.

Which *witnesses* are also to be persons of credit, disinterested, and not such as have been convicted either of felony, or perjury, or persons *non sanæ memoriæ*.

When all the witnesses have been heard and examined, the judge sums up the evidence, and gives it in charge to the jury to do impartially therein.

If the jury do not immediately agree on their verdict, but withdraw to consider of it, then a bailiff is to keep them without meat, drink, fire or candle, and without being admitted to the speech of any, in which manner they are all kept together till they agree and bring in their verdict.

The *Verdict* (*vere dictum*) is the answer that is given to the court by the jury by their foreman, concerning the matter of fact in issue in the suit committed to the trial; in which every one of the jurors must agree, otherwise it can be no verdict.

And a verdict must in all things answer the issue, or it will not be good; if the plaintiff fails to prove his issue, there the verdict ought to be found for the defendant; and no verdict can make that good which is not so by law, of which the court is to be judge.

In case any of the jurors eat or drink, at the charge of the party for whom they give their verdict, or if either of the parties, or their attornies, do say any thing to the jury which relates to the cause, before they are agreed on the verdict, as "that it is a clear cause," or "I hope you find for such a person," &c. Or if a witness be sent for by the jury, after he is gone from the bar, and he repeats his evidence again; in any of these cases the verdict shall be void, and set aside.

Also the jurors may be fined, for being tampered with; and an attaint will lie against a jury for giving their verdict contrary to evidence, where any corrup-

tion appears, on which, being convicted, they are liable to a very severe punishment; likewise if they take any thing to give a verdict, they shall forfeit ten times as much as taken, and be imprisoned for a year.

The jury being returned to the bar, and ready to give in their verdict, the plaintiff is then called, and if he do not appear, a nonsuit shall be recorded, &c. but if he appears, the clerk of assize asks the jury whom they find for, and what costs and damages, and so enters it on the panel, and repeats it to the jury, which finishes the trial.

And after the trial is over, the associate delivers to the plaintiff's attorney the record with the *distringas*, and the names of the jury annexed, on the back of which he indorses the substance of the verdict, and then upon the back of the record is engrossed the *postea*, to this effect:

'That afterwards the plaintiff and defendant came before such a judge, and the jury was elected and sworn, and found such verdict and costs, &c.'

This is to be carried to the clerk of the *posteas* to be marked, and after delivered to the clerk of the rules, and he makes a four days' rule for judgment, (that time being allowed the defendant to move in *arrest of judgment*) and when such rule is out, if it be not arrested, the judgment is fit to be entered.

The *Judgment* signifies the determination or sentence of the judges upon the suit or action tried; which, if given contrary to the verdict, will not be a good judgment.

In trials at the assizes, the record is generally kept by the associate till next term, when he is to be called

upon for the same, and then it is marked, and a rule taken out as aforesaid; and thereupon judgment is signed, and entered on a roll, on which a *writ of execution* is awarded, against either the body, goods, or lands, of the defendant.

New Trials are granted in several cases; as where there was not sufficient notice given to the defendant of the former trial; or if excessive damages are assessed by the jury; or a verdict is given against evidence; or in case any fraud appear.

Though a new trial shall not be allowed for want of evidence at a former trial, which the party might then have produced.

Trial at Bar is ordained when causes require great examination, and the trial in question is difficult or intricate, for the better satisfaction of the parties concerned.

And in order to such trials, the juries and witnesses must come to the courts at Westminster.

Bill of Exceptions is where the plaintiff or defendant in a suit alleges any exception to the judge's opinion, which may be put down in writing, and signed by counsel, &c. and here the court above proceeds to judgment according to the exceptions tendered.

Writ of Error is that writ which is brought by a plaintiff or defendant in any action, who is grieved by the proceedings and judgment given therein; and which any person damnified by error in a record, or

who can be supposed to be injured thereby, may bring; on which the judgment may be reversed.

These writs of error are returnable from the court in which the action is tried to the *Exchequer Chamber*, and lastly, to the *Lords in Parliament*, the supreme tribunal.

And thus we may observe, through the abundant care and punctuality required by law in the trial of causes, there is as much as art and conscience can contrive against corruption, and in favour of right.

CHAPTER VIII.

WORDS OF ART AND TERMS OF LAW IN GENERAL USE.

In a work of this description comparatively few of the terms known to the law can or ought to be included; but the student will find this deficiency very ably supplied by Holthouse's Pocket Law Dictionary, already referred to in a previous Chapter.

Terms of the Law are such artificial or technical words and *terms of art*, as are particularly used in and adapted to the profession of the law: and the most considerable of these relate either to writs and process of the courts, or the practice of pleading, and contain as follows:

Abbroachment is the forestalling of a market or fair, by purchasing the wares before they are therein exposed to sale, and then selling them by retail.—*Termes de la Ley*, 5.

Abet, from *abettare*, to stir up or incite, signifies, in our law, as much as to encourage or set on. An

abettor, therefore, is an instigator or setter on, one that promotes or procures a crime to be committed.

Abeyance is derived from the French word *beyer*, to expect, and signifies that the fee or freehold of land is not vested in any one, but stands, in consideration of law, in waiting or expectation of an owner or proprietor; for although there be no person *in esse* in whom it can vest and abide, yet the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. The word *abeyance* hath been compared to what the civilians call *hæreditatem jacentem;* for as the civilians say lands and goods do *jacere*, so the common lawyers say that things in like estate are *in abeyance;* or, as the logicians term it, *in posse.* Thus in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis:* it remains, therefore, in waiting or *abeyance* during the life of Richard. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance. So also when a bishop, dean, archdeacon, prebendary, parson, or any other sole corporation dies, the fee of the glebe or rectory, and the freehold of the church, whether presentative, elective, or donative, is in abeyance. So also if by act of parliament the king renounces an estate, and by the same act it is not vested in other person, it remains in abeyance.—*Co. Lit.* 342 b; 2 *Bl. Com.* 107; *Walsingham's case, Plowd. Dallison,* 42.

Abigevus signifies a thief who has stolen many cattle. Thus, *Bracton* says, "*si quis suem surripuit fur erit, et si quis gregem abigevus erit.*"—*Bract.* b. 3, c. 6.

Absque hoc, without this, &c. are the technical words of exception made use of in pleading *a traverse.* But words equipollent may be used, and therefore a traverse by the words *et non* are sufficient.—1 *Saund.* 22; 5 *Co. Dig.* 109; *Mod. Cases,* 103; 1 *Lev.* 192; *Lutw.* 460, 1457.

Accedas ad Curiam was the name of a writ, where a man had a false judgment given against him in the hundred court or court baron; it is directed to the sheriff, and issued out of the chancery.—3 *Bl. Com.* 34.

Accord is a word derived from the *French,* that signifies an agreement between two or more, where any one is injured by a trespass committed, to make recompense and satisfaction to the party grieved; and which, after the accord is performed and executed, may be pleaded in bar to any action brought for the same trespass.—*Termes de Ley.*

Addition signifies in law the adding of the estate, degree, or mystery, which any person is of, to their Christian and surnames; for by the 1 *Hen.* 5, c. 5, all persons shall in law proceedings be styled by their name and addition.—1 *Bl. Com.* 406; 3 *Bl. Com.* 302.

Ademption signifies the taking away of a legacy; as

if a man had bequeathed to another a bond on which money was due by a third person, and before the will takes effect he calls in the money from the obligor.—*Chancery Cases, temp. Talb.* 227.

Adnichiled is derived from the Latin word *nihil*, written of old *nichil*, and signifies, as appears by the statute 28 *Hen.* 8 annulled, cancelled, or made void.—*Jacob's Law Dictionary.*

Ad quod damnum is a writ which, it was said, ought to be issued before the king granted certain liberties, as a fair, market, &c., which might be prejudicial to others, directing the sheriff to inquire what damage it might do for the king to grant such market, fair, &c. It was also the ancient method of obtaining a right to turn the course of an old road, or to make a new one; but in this respect the proceedings are now rendered more easy by the 13 *Geo.* 3, c. 78, s. 31.—*Termes de la Ley*, 25; *Noy*, 105; *F. N. B.* 141, 225; *Vaughan*, 341; *Cro. Eliz.* 267; 1 *Co. Dig.* 302; 1 *Hawkins's Pleas of the Crown*, 369, 386.

Advocati were those persons who we now call patrons of churches.

Afferors, from the French *affier*, to affirm, are those who in courts leets, upon oath, settle and moderate the fines and amerciaments imposed upon such persons as have committed faults punishable at the discretion of the Court.—4 *Co. Dig.* 139.

Age-prior is where an action is brought against an

infant for lands which he hath by descent, he, by petition, plea, or motion, shows his infancy to the court, and prays that the action may stay, or, according to the more technical phrase, that *parol may demur* until his full age.—*Termes de la Ley*, 30.

Agent and Patient is where a person is the doer of a thing, and also the party to whom it is done. Thus where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient.* This term is also applied to those cases where the doctrine of *remitter* prevails.

Agistment, from the French *giste*, a bed or resting place, signifies to take in and feed the cattle of strangers, at a certain rate per week.—*2 Inst.* 643; *Spelman's Glos.*

Alias is a second writ, which issues from the courts at *Westminster*, after a first writ has been sued out and returned without any effect.

Allodial signifies an inheritance held without any acknowledgment to any lord or superior, as contra-distinguished from an inheritance in fee, which in its general acceptation signifies land holden. In England there is no such thing as *allodial* property, for, in contemplation of law, all the lands and tenements in England, in the hands of subjects, are *holden* mediately or immediately of the king. — *Wright's Tenures*, 149; *Smith's Commonwealth of England*, bk. 3, c. 10; *Cowel's*

Interpreter, verbum Fee; *Co. Lit.* s. 1; *2 Inst.* 501; *4 Inst.* 192; *2 Bl. Com.* 105.

Amenable, from the French *amener*, to bring or lead unto; in a modern sense signifies to be responsible or subject to answer a court of justice.—*Cowel.*

Amicus Curiæ, a friend of the court. Thus if a judge is doubtful or mistaken in a point of law, a barrister may speak to the subject, and offer his sentiments as an *amicus curiæ*.—*Co. Lit.* 178.

Anatocism signifies the taking of usurious interest for the loan of money, when the lender extorts compound interest, or joins and accumulates together the interest of several years, and requires a new interest to be paid for them, as for the first and true principal.—1 *Postle.* 59.

Apparitor is the messenger who serves the process of the spiritual courts, to cite them to appear, to arrest them for contumacy and to execute the sentence or decree of the judges.—*Ayliff's Parergon*, 70; *2 Bulst.* 264.

Apportionment signifies the dividing of a rent into parts, according as the land out of which it issues is divided among one or more proprietors. Thus where a lessor recovers part of the land, or enters for a forfeiture into part of the land, the rent shall be apportioned.—*Co. Lit.* 148; *Moor*, 231.

Approvement is where a man hath common in the

lord's waste, and the lord makes *an inclosure* of part of the waste for himself, leaving sufficient common, with egress and regress for the commoners. This right is regulated by the statute of *Merton*, *20 Hen. 3*, c. 4; the statute of *Westminster*, 2, *13 Edw.* 1. c. 46; *29 Geo. 2*, c. 36 and *31 Geo. 2*, c. 41; 1 *Ro. Ab.* 90, 405; 9 *Co.* 112; 2 *Inst.* 474; 2 *Bl. Com.* 34; 3 *Bl. Com.* 240. See the case of *Glover* v. *Lane*, *Mich. 30 Geo. 3*, *3 Term Rep.* 445.

Assumpsit, from the Latin, is taken in the law for a voluntary promise, whereby a person assumes or takes upon him to perform or pay a thing: and when any one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if he do not, *indebitatus assumpsit*, or action on the case, lies against him.

Attachment is a custom in many places abroad, and particularly in London, whereby a creditor may attach the goods of his debtor in any hands where he findeth them, privileged persons and places only excepted.

Attornment signifies the tenant's acknowledgment of a new lord, on the sale of lands, &c. As where there is tenant for life, and he in reversion grants his right to another, it is necessary the tenant for life should agree to it, which is called *attornment*. But by the 4 *Ann.* c. 16 and 11 *Geo. 2*, c. 19, attornments are in almost every case rendered unnecessary.—*Co. Lit.* 316.

Average is said to signify service which the tenant owes to his lord by horse or carriage; but is more

commonly used to signify a contribution that merchants and others make towards their losses who have their goods cast into the sea for the safeguard of the ship, or of the other goods and lives of those persons who are in the ship during a tempest.—*Park's Marine Insurances*, 99, 121, 124.

Averment is, in pleading, the positive assertion of some fact, or an offer to do some act. Thus where a man pleads a plea in abatement of the writ, or in bar of the action, which he saith he is ready to prove, as the court shall award; this offer to prove the plea is called an averment: "*et hoc est paratus verificare.*—3 *Bl. Com.* 309; 4 *Bl. Com.* 334.

Audita querela is a writ that lies where a person has any thing to plead, but hath not a day in court for pleading it; as when one is bound in a statute or recognizance, or where judgment is given in debt, and the defendant's body in execution, then if he have a release, or other sufficient cause to be discharged from it, this writ may be granted him against the person that hath recovered.

For to writs of execution the defendant cannot plead; so that if there be any matter since the judgment to discharge him of the execution, he shall have *audita querela*.

Autre droit is where a person does or suffers a thing in the *right of another*. Thus executors, administrators, &c. act in *autre droit*, that is, in right of their testator or intestate, and not in their own right.—2 *Bl. Com.* 177.

Bar, in a legal sense, is a plea or peremptory exception of a defendant sufficient to destroy the plaintiff's action.

Base court is any inferior court that is not of record; as the court baron, &c.—*Kitchen*, 95.

Beau pleader, *pulchrè placitando*, fair pleading, was a writ upon the statute of *Marlbridge*, 52 *Hen. 3*, c. 11, to prohibit a fine that used formerly to be assessed for not pleading fairly or aptly to the purpose; the course now being, to punish the party by making him pay the costs of improper pleadings, under an order of the court in which they are filed.—*F. N. B.* 596; 2 *Inst.* 122.

Besaile, *bisayeul*, *proavus*, the father of the grandfather; and, at common law, it signified a writ used where the great-grandfather was seised the day that he died of any lands or tenements in fee simple, and after his death a stranger entered the same day and kept out the heir.—*F. N. B.* 224. And see *Booth on Real Actions*.

Bona notabilia is where a person dies, having at the time of his death goods in any other diocese, besides his goods in the diocese where he dies, amounting to the value of *five pounds* at least.—*Perkins*, 489; 2 *Bl. Com.* 509.

Calling the plaintiff is the ceremony which takes place when a plaintiff is nonsuited. It is usual for a plaintiff, when he or his counsel perceives that he has

not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself; whereupon the crier is ordered to *call the plaintiff*, and if neither he nor any one for him appears, he is *non-suited*, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. But this is not, like a *retraxit* or a *verdict*, a bar to another action.—3 *Bl. Com.* 296, 316, 376.

Capias is a writ of two sorts; one before judgment, called *capias ad respondendum*, where an original is sued out, &c. to take the defendant, and make him answer the plaintiff; and the other a writ of execution, called *capias ad satisfaciendum*, which issues on a judgment obtained, and is directed to the sheriff, commanding him that he take the defendant's body and imprison him till satisfaction be made for the debt, &c. recovered against him.

If the body of the defendant is once taken in execution upon the writ, and the writ is returned and filed, no other execution can go against his lands or goods: but see 1 & 2 *Vict.* c. 110. By the statute 2 *Geo.* 2, persons charged in execution for any debt not exceeding 100*l.*, on petition to the court whence the process issued, with an account of all their estates upon oath, might be discharged out of prison, on assigning their effects to the plaintiff, unless the plaintiff chose to allow the prisoner 4*d.* a day.

Caption is when a commission is executed, the commissioners subscribe their names to a certificate when and where the commission was executed, which in law

is called *a caption*, or *taking* of thing ordered to be done.

Castigatory is the name of the instrument by which a woman is punished when convicted of being a common scold. It is also called *the trebucket* or *cucking-stool*, which is frequently corrupted into *ducking-stool*, because part of the judgment is, that when the offender is placed in it, she shall be plunged into water.—*3 Inst.* 319; *4 Bl. Com.* 169. And see *Jacob's Law Dictionary*.

Casus omissus is where any particular thing is omitted out of or not provided for by a statute, &c.

Cepi corpus is the return made by the sheriff upon a *capias*, or other process to the like purpose, that he hath *taken the body* of the party.—*F. N. B.* 26.

Cestui que trust is he for whom the trust of lands or tenements are committed to another.—*Gilbert's Tracts*, 3.

Cestui que use signifies him to whose use any other man is enfeoffed of lands or tenements.—*Perk.* 97; *Co. Lit.* 133.

Cestui que vie is he for whose life any lands or tenements are granted.—*Perk.* 97.

Clausum fregit signifies an action of trespass committed upon lands or tenements.

Cognovit actionem is where a defendant acknowledges

or confesses the plaintiff's cause against him to be just and true, and, either before or after issue, suffers judgment to be entered against him without trial. And in this case *the confession* generally extends to no more than is contained in the declaration; but the defendant may confess more if he will.—1 *Roll.* 929; *Hob.* 178; 3 *Bl. Com.* 304, 397.

Colloquium, à colloquendo, signifies a talking together or affirming a thing. Thus, for words spoken, it must be laid in the declaration, in an action of slander, that the speaking was *of and concerning* the plaintiff.—*Carth.* 90; *Modern Cases,* 203. And see the case of *Rex* v. *Horne, Cowp. Rep.* 672.

Colour signifies a probable plea, but which is in fact false; and it hath this effect, to draw the trial of the cause from the jury to the judges.—10 *Co.* 88, 90; *Cro. Jac.* 122; *Lutw.* 1343; 1 *Co.* 79, 108; 3 *Bl. Com.* 309.

Congeable is derived from the French *congé,* leave or permission; and signifies in our law, that a thing is lawful, or lawfully done, or done with permission.—*Lit.* s. 420.

Continuando was a word used in a special declaration of *trespass,* when the plaintiff would recover damages for several trespasses in the same action.—*Termes de Ley; 3 Lev.* 94; *Lutw.* 1312; 3 *Bl. Com.* 212.

Coram non judice is where a cause is brought and

determined in a court, of which cause the judges have no jurisdiction.—*Cro. Jac.* 351.

Covin, covina, is a compact between two or more to deceive or prejudice others; as if tenant for life, or in tail, conspire with another, that he shall recover the land which he the tenant holds, in prejudice to him in reversion.—*Plowd.* 546; *Brownl.* 188; *Bridg.* 112; 3 *Co.* 83; *Co. Lit.* 357; 1 *Roll. Ab.* 621; 2 *Inst.* 713.

Curia advisare vult is the entry made when the court take time to deliberate upon any point of difficulty, before they give judgement in a cause.—*Shepherd's Epitome,* 682.

Curtilage signifies a court-yard, backside, or piece of ground lying near or belonging to a dwelling-house: as the yard, garden, and, in short, every thing that is within the homestall or fence by which the mansion-house is surrounded.—6 *Co.* 64.

Damnum absque injurid signifies that sort of loss or damage which a man may sustain without thereby receiving a legal injury. Thus if a man keep a school in a particular place, and another person opens a seminary in the same place, whereby the first loses scholars that he would otherwise have had, this is to his damage, but it is not that sort of injury for which the law affords any redress; but if his rival take improper methods to draw those scholars he has already got away, an action on the case lies to recover damages for the consequential injury he may thereby receive.—3 *Salk.* 64.

De bene esse is a phrase which signifies to accept or allow any thing as well done for the present, but when it comes to be tried or more fully examined, to stand or fall according to the merit of the thing in its own nature. Thus, on all process returnable before the last return of any term, when no affidavit is made or filed of the cause of action, the plaintiff may file or deliver a declaration *de bene esse*, or conditionally.—*Cro. Eliz.* 68; *Lofft*, 333; 2 *Term Rep.* 719; Mr. *Tidd's Practice of the Court of King's Bench*, p. 232.

Dedimus potestatem is a writ or commission given to one or more private persons, for speeding some act appertaining to a judge, or to some court. It is granted most commonly upon suggestion that the party who is to do the act is so weak that he cannot travel: as where a person lives in the country, to take an answer in chancery, to examine witnesses, to take an acknowledgment, to swear in a justice of the peace, &c. &c.—*Natura Brevium*, 65; 1 *Bl. Com.* 352; 2 *Bl. Com.* 351; 3 *Bl. Com.* 447.

Demurrer is a term from the French and Latin, signifying a delay or stop put to any action, upon some point of difficulty which must be determined by the court before any further proceedings can be had in the suit; and a demurrer is said to be an issue joined on matter of law, which the judges only are to determine; or an abiding in and referring to the judgment of the court, whether the declaration or plea of the adverse party is sufficient in law to be maintained.

And where a defendant may demur, he must do it; for if he pleads in such a case, he shall not afterwards

take any advantage in arrest of judgment, or by writ of error, &c.

Duces tecum is a writ commanding a person to appear at a certain day in the Court of Chancery, and to bring with him such writings, evidences, or other things, as the court would view. So also *subpœnas duces tecum* are often sued out at common law, to compel witnesses to produce on trials at nisi prius, deeds, bonds, bills, notes, books, and memorandums, in their power or custody, relating to the issue in question. But if the document required be in the power of the opposite party, or his attorney, it is usual to give them notice to produce them, and on proof of such notice, the court will, if necessary, compel the production.

Elegit is a writ of execution that lies for one who has recovered a debt or damages, against a defendant that is not able to satisfy the same in his goods, but is possessed of lands; and this writ is directed to the sheriff to make delivery of a moiety of the party's lands, and all his goods, beasts of the plough excepted, which is done by inquest of a jury; and the creditor by virtue thereof shall hold the said moiety of the said lands so delivered to him until his whole debt and damages are paid and satisfied.—See 1 *&* 2 *Vict.* c. 110.

Emblements signify properly the profits of lands sown, but the word is sometimes used more largely for any products that arise naturally from the ground, as grass, fruit, &c.—*5 Co.* 116; *Co. Lit. 55, 56*; *Cro. Eliz. 463*; *Cro. Car. 575.*

Enure signifies in law to take place or be available, and is as much as *affectum*. Thus a release made to a tenant for life shall enure, and be of force and effect to him in reversion.

Escrów is an instrument delivered to a third person, to be the deed of the party making it upon a future condition, whenever that condition shall be performed, and then it is to be delivered to the party *to whom it is made*. Therefore, to deliver an *escrow* signifies that the deed delivered shall be considered only as a *scrowl*, or writing, until the condition be performed, and then, and not till then, it shall take effect as *a deed*.—*2 Roll. Abr. 25*; *Co. Lit. 31, 36*: *2 Bl. Com. 387*.

Esplees are the products which hereditaments, corporeal or incorporeal, yield; as the hay of meadows, the herbage of pastures, and the corn of arable lands; the rents and services of tenures, the titles in gross of advowsons, the timber and brushes of woods, the fruits of an orchard, the toll or dish service of a mill, &c. all which and such like issues are termed *esplees*: and, in the old writ of right, it was averred, that the party claiming, or the ancestor under whom he claimed, took the *esplees*; for this writ could not be maintained without showing actual seisin, by taking the *esplees*, either in the demandant or his ancestor.—*Termes de la Ley, 258*; *F. N. B. 78, 459*; *Co. Lit. 52*; *Daly* v. *King, Easter Term, 28 Geo. 3, in C. B.*; *H. Black. Rep. 1*.

Estovers signify to supply with necessaries, and is generally used in law for allowances of wood made to

tenants, comprehending house-bote, hedge-bote, cart-bote, plough-bote, &c. for repairs.—*Bracton*, book 3, tract 2, c. 18; 1 *Bl. Com.* 441; 1 *Lev.* 6.

Estrepement is where any spoil or waste is made by a tenant on lands, to the prejudice of him in reversion; as by continual ploughing and drawing away the heart of the land, and neglecting to manure it, or not using it with good husbandry, whereby it is impaired.—*F. N. B.* 60.

Ex mero motu are words used in the King's charters and letters patent, to signify that he grants them of his own will and motion, without petition or suggestion of any other; and the intent and effect of these words is to bar all exceptions that might be taken to the charters or letters patent, by alleging that the king in granting them was abused or misled by false suggestions: therefore, whenever the words *ex mero motu* are used in any royal grant, they shall be taken most strongly against the king.—*Kitchen*, 352; 1 *Co.* 451.

Ex officio is a phrase used to signify the power which any person possesses by virtue of an office to do certain acts of his own accord, without application to him for the purpose. Thus a justice of the peace may not only grant surety of the peace, upon the complaint or request of any person, but he may demand and take it *ex officio*. Thus also the attorney-general may, by virtue of his office, file informations at the suit of the king, without applying to the court, as every other person must do, for leave so to do.—*Dalton*, 270.

Ex parte signifies an act done or proceeding had by one party only.

Ex post facto is used in law to signify something done after another thing that was committed before.—5 *Co.* 22; 8 *Co.* 146.

Extinguishment signifies a *consolidation.* Thus, if a man hath a yearly rent out of lands, and afterwards purchase the land out of which the rent issues, so that he hath as good an estate in the land as he hath in the rent, the land and rent are then consolidated or united in one possessor, and therefore the rent is said to be extinguished. So also, by purchasing lands wherein a person hath common appendant, the common is extinguished. Thus also, if *feme sole* debtee take the debtor to husband; or if there be two joint obligors in a bond, and the obligee marries one of them; in these cases the debt will be extinguished.—*Termes de la Ley; Co. Lit.* 147; *Vaugh.* 40; *Dyer,* 140; 1 *Co.* 96; 12 *Co.* 81; *Cro. Eliz.* 594; 8 *Co.* 136; *Plowd.* 184; 1 *Salk.* 384.

False Imprisonment signifies a violent trespass committed against a person by arresting and imprisoning him without just cause, contrary to law; or where one is detained in prison without legal process, or kept longer in hold than he ought, or if he be any way unlawfully detained; it is also used for a writ or action brought for such trespass, in which generally very considerable damages are recovered; for the law favours the freedom of a person from imprisonment.

Feigned Issue. If in a suit in equity any matter of

fact be strongly contested, the court usually directs it to be tried by a jury; as whether A. is heir at law to B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried in the courts of common law at Westminster, or at the assizes upon a *feigned issue*. For this purpose a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of five pounds with the defendant, that A. was heir at law to B., and then averring that he is so, brings his action to recover the five pounds. The defendant allows the wager, but avers that A. is not heir at law to B., and thereupon the issue, which is directed out of the Court of Chancery to be tried, is joined. And thus the verdict of jurors in a court of law determines the fact in a court of equity.—3 *Bl. Com.* 451.

Fieri facias is a judicial writ that lies where a person has recovered judgment for debt or damages in the king's courts against any one, by which the sheriff is commanded to levy the debt and damages on the defendant's goods. Upon a *fieri facias* the sheriff is to use his best endeavours to levy the money on the goods and chattels of the defendant; he may sell a term for years, corn growing, &c., and has power to take any thing of the defendant's, except it be wearing clothes.

But the goods of a stranger, in the possession of the defendant, shall not be subject to the execution; nor may a sheriff break open the door of an house to execute this writ on the goods of the owner, &c.

Filum aquæ is the *thread* or middle of the *stream*

where a river parts two lordships. Thus also, *file de mer* signifies the middle or high tide of the sea.—*3 Mon. Angl.* tom. 1, fo. 390.

Flotsam is where a ship is sunk or cast away, and the goods are floating on the sea. *Flotsam, jetsam,* and *ligan,* are generally mentioned together; *jetsam* being the things thrown out of a ship to prevent her sinking; and *ligan* are those goods which, so thrown overboard, sink to the bottom.—*Lex Mercator.* 149; *5 Co.* 106; *F. N. B.* 122; 1 *Keble,* 657. See 12 *Anne,* c. 18, and 26 *Geo. 2,* c. 19.

Forma pauperis is where any person has just cause of suit, and is so poor that he is not worth five pounds after all his debts are paid, and excepting the property in question; on oath made of this fact, and a certificate from some lawyer that he hath good cause of action, the court will admit him to sue *in formâ pauperis,* without paying any fees to counsel, attorney, or clerks in court.—See the statutes of 11 *Hen.* 7, c. 12; 1 *Mod.* 268; *23 Hen.* 8, c. 15; *3 Bl. Com.* 400.

Garnishment. If an action of detinue of charters be brought against one, and the defendant saith that they were delivered to him by the plaintiff and another person upon certain conditions, and prays that the other may be warned to appear with the plaintiff, the writ of *scire facias* which goes against him is called *garnishment:* and when he comes, he shall plead with the plaintiff, which is called the *interpleader.*—*Termes de la Ley,* 369.

Glebe are lands of which a vicar or rector is seised *in jure ecclesiæ.—Termes de la Ley*, 379.

Gros bois is such wood which properly, in some places, either by custom or common law, signifies *timber.—2 Inst.* 642; *Cro. Eliz.* 1.

Habere facias possessionem is a writ which lies where one has recovered a term for years in action, in order to put him into *possession:* there is likewise a writ of this kind commanding the sheriff to give a proper *seisin* of land recovered in an *ejectment.* On these writs, the sheriff may justify breaking open the house, where entrance is denied, to deliver possession to the party recovering at law.

Herbage and Pannage. Herbage is the green pasture and fruit of the earth provided by nature for the bite or food of cattle; and *pannage* is that food which the swine feed on in the woods, as the masts of beech, acorns, &c.—*Cromp. Juris.* 197. See *Doug. Rep.* 302, 304.

Jeofail is a word derived from the French *j'ai faillé*, that is, *ego lapsus sum*, and signifies an oversight in pleading, or other law proceedings. By the allowance of these mistakes being found to interrupt and retard the course of justice, the legislature has by the statutes *32 Hen.* 8, c. 30; 18 *Eliz.* c. 14; 21 *Jac.* 1, c. 13; 16 & 17 *Car.* 2, c. 8; 4 & 5 *Anne*, c. 16; and 5 *Geo.* 1, c. 13, prevented them from taking effect whenever they are mere matter of form, after a verdict has established

on which side, in the opinion of the jury, the right in question lies.—3 *Bl. Com.* 406; 4 *Bl. Com.* 369, 432.

In esse signifies any thing in being. Things are in law distinguished into those that are *in esse* and those that are only *in posse*. Thus any thing that is not in actual being, but may by possibility exist, is said to be *in posse*, or *in potentiâ;* but what is apparent and visible is alleged to be *in esse*, or actual being. A child, for instance, before it is born is *in posse;* after it is born it is *in esse*, or actual being.—*Co. Lit.* 342; *ante*, p. 227.

Innuendo is a word that was frequently used in declarations of slander and law pleadings, when they were in Latin, for ascertaining a person or thing that was before named, or appropriating the meaning of the words spoken, to the plaintiff. Though an *innuendo* cannot make that certain which was uncertain before; and the law will not allow words to be enlarged by *innuendo*, so as to support an action on the case for uttering them.

Journeys accounts is a term in our law where a writ abates by the death of the plaintiff or defendant in a cause, or for want of form, &c. in which case the plaintiff becomes entitled to have a new writ by *journeys accounts*, that is to say, within as little time as he possibly can after the abatement of the first writ; so that the second writ shall be a continuance of the cause as much as if the first writ had never abated.

Latitat was an ancient form of writ that issued out

of the Court of the Queen's Bench, where the defendant could not be found in the county of Middlesex, but had fled into some other county, and was alleged to be lurking and lying hid therein; this writ was directed to the sheriff, commanding him to apprehend the defendant, but it is now superseded by the Writ of Summons.

Levant et couchant are terms in law for cattle that have been so long in the ground of another, that they have lain down and are risen again to feed. The usual time in which cattle are said to have been *levant et couchant* is supposed to be a day and a night.—*Termes de la Ley*; 2 *Lilly*, 167; *Wood's Inst.* 190; 3 *Bl. Com.* 239.

Mainour, in a legal sense, denotes the thing that a thief taketh away or stealeth; so that when it is said that a thief is taken *in the mainour*, it means that he is taken with the thing stolen in his hands or possession. —*Plowd.* 179; 4 *Bl. Com.* 303.

Negative is what cannot be testified or proved by witnesses in our law, only an affirmative; but if a man be accused to have been at York, and there to have done such a fact, he may prove the negative by collateral testimony, that he was at that very same time at another place in such company.

Negative Pregnant is a term in special pleading signifying a negative proposition including an implied affirmative. Thus if a declaration charge the defendant with having done an act on a particular day, or in a particular place, and he plead that he did not do it

modo et formâ, in the manner and form as stated in the declaration, it may be implied affirmatively, that he did it in some other manner or form than that stated. Thus, also, if a man be charged with having aliened land, and he reply, that he hath not aliened in fee, this is a negative pregnant, for he may have aliened in tail. This mode of pleading is faulty, but there must be a special demurrer to a negative pregnant; for the court will intend every plea to be good until the contrary appear.—*Dyer*, 17, pl. 95; *Kitchen*, 232; 2 *Leon.* 248; *Cro. Jac.* 559: 5 *Com. Dig.*

Nil debet, that he owes nothing, was the usual plea in an action of debt; but is now discontinued by R. G. of Hil. Term, 4 *Will.* 4.

Nil dicit, writ short; *nil dicit* signifies a failure in the defendant to put in his answer to the plaintiff's declaration, &c. by the day assigned, on which judgment of course is had against him.

Nomine Pœnæ is the penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for the payment thereof.—2 *Lilly*, 221; *Hobart*, 82; 8 *Anne*, c. 17.

Non-assumpsit is the general plea in a personal action, whereby one denies any promise made *modo et formâ* as the plaintiff hath alleged.

Non est culpabilis, or not guilty, is the usual plea to an indictment or action of trespass.

Non est factum is a plea where any action is brought upon a bond or other deed, and the defendant denies the execution of the deed; all other defences to actions on covenant must be specially pleaded.

Non pros is where a plaintiff in an action does not declare or proceed in a reasonable time; and a *Nolle Prosequi* may be entered by the plaintiff, if having commenced an action he will not proceed therein, or as to a part of his demand.

Nonsuit signifies the dropping of a suit or action, and is most commonly upon the discovery of some error in the plaintiff's proceedings, when the cause is so far proceeded in, that the jury is ready at the bar to deliver in their verdict; on his being called, and not appearing, or not prosecuting his action with effect, &c. whereupon costs are allowed to the defendant.

Nude contract is a bare *naked contract* without a consideration; it is also called *nudum pactum*. A consideration is the material cause of every contract or agreement, or that thing in expectation of which each party is induced to give his consent to what is stipulated reciprocally between both parties. Thus if one buy of me a house or other thing for money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered; here no action lies for the money or the thing sold, but the owner may sell it to another if he will; for such provisions or contracts are deemed *nuda pacta*, there being no consideration or cause for them but the covenants themselves, which will not yield an action; and this agrees with the defi-

nition of *nudum pactum* as given by the civilians, namely, *nudum pactum est ubi nulla subest causa præter conventionem.* — *The Year-book*, 11 *Hen.* 4, pl. 38; *Plowd.* 302, 309; *Dyer*, 30; *Fitz.* "*Debt*," 126; *Ld. Raym.* 909; 3 *Burr.* 1663; 2 *Bl. Com.* 444; *Powel on Contracts*, vol. i. p. 320 to 344.

Outlawry is where a person is outlawed, that is, deprived of the benefit of the law, and therefore held to be out of the king's protection; as where an original writ, and the writ of *capias*, *alias*, and *pluries*, have been issued against him, and are returned by the sheriff *non est inventus*, and after an exigent for the sheriff to demand him at five successive county courts, and *proclamation* made for him to appear, &c.; if he omits so doing he then becomes outlawed.

A person outlawed forfeits his goods and chattels, &c. and cannot sue in any court, only to reverse the outlawry, which he may do for error, or when the statutes relating to the same are not exactly pursued, and frequently by merely appearing.

Oyer is where an action being brought on a deed or bond, the defendant appears and prays that *he may hear the deed* (*a*) on which the action is brought, and also have a copy thereof, that he may consider what to plead thereto; and the defendant is not obliged to plead without it.

Paraphernalia is derived from the Greek Παρὰ,

(*a*) So called from the proceedings being formerly *ore tenus* in the courts.

præter, and Φερνη, *dos*, and signifies in law those goods which a wife challenges *over and above her dower* or jointure, after her husband's death; as furniture for her chamber, wearing apparel and jewels, which are not to be put into the inventory of her husband's effects.—1 *Ro. Ab.* 911; *Noy's Max.* 168; 2 *Leon.* 166; *Cro. Car.* 347; 2 *Bl. Com.* 435; 1 *Com. Dig.*

Paravail, per availe, signifies the lowest tenant of the fee, or he who is immediately tenant to one who holds over another; and he is called *tenant paravail*, because it is perceived that he hath *profit and avail* by the land. —*F. N. B.* 135; 2 *Inst.* 296; 2 *Bl. Com.* 60.

Peculiar signifies a particular parish or church that hath jurisdiction within itself, and power to grant administration, probate of wills, &c. exempt from the ordinary.—*Wood's Institutes*, 504; 4 *Inst.* 338; *Hob.* 185; 2 *Ro. Rep.* 357; 5 *Mod.* 239; 3 *Bl. Com.* 65.

Pernancy, from the French verb *prendre*, to take, signifies a taking or receiving; as *tithes in pernancy* are tithes taken, or that may be taken in kind. Thus also the person who receives or takes the profits of lands is called the *pernor of the profits*.—1 *Co.* 123; *Raym.* 17; *Co. Lit.* 589; 2 *Bl. Com.* 163.

Pluries is the name of a writ that issues after two former writs have gone out without effect.

Posse Comitatus, the power of the county, which includes the aid and attendance of all knights and other men above the age of fifteen, within the county; but

ecclesiastical persons, and such as labour under any infirmity, are not compellable to attend. This power is in the hands of the sheriffs, who may call it forth to enable them to execute the process of the law, and to do other acts for the furtherance of justice.—*Lambard*, 313; *Crompton*, 62; *Dalton*, c. 46; 2 *Inst.* 193; 1 *Hawk. P. C.* 152; 1 *Bl. Com.* 343; 4 *Bl. Com.* 122.

Possessio Fratris is where a man hath a son and a daughter by one woman or *venter*, and a son by another woman or *venter*, and dies; if the first son enter upon the estate of his father, and die seised without issue, the daughter shall have the land as heir to her brother, although the son by the second *venter* is heir to the father; for *possessio fratris de feodo simplici facit sororem esse hæredem:* but if the eldest son die without issue, not having made an actual entry and seisin, the younger brother by the second wife, as heir to the father, shall enjoy the land, and not the sister.—*Co. Lit.* 14, 15; 3 *Co.* 42; *Cro. Car.* 347, 601; *Bracton*, b. 2, fo. 63; *Britton*, c. 119; *Fleta*, b. 6, c. 1.

Possibility is defined to be "*an uncertain thing*," which may or may not happen; and a possibility is either *near* or *remote*. Thus, for instance, where an estate is limited to one after the death of another, this is a *near* possibility; but a limitation to a man if he shall marry A., and after her death shall marry B., is a possibility so *remote*, that the law pays no regard to it. It was formerly held that a possibility, mere right, or *chose in action*, could not be granted over; but it has been lately determined, that *a possibility*, coupled with an interest, is devisable.—2 *Lilly's Abr.* 336; 15

Hen. 7, pl. 10; *Hardres*, 417; 2 *Co.* 50; 4 *Co.* 66; 10 *Co.* 48; 3 *Term Rep.* 88.

Postea is a term in law signifying the return of the judge, made upon the record, of what was done in the cause after the issue between the parties is joined.

Prender is the power or right to take a thing *before it is offered.—Sir John Peter's case*, 1 *Co. Rep.*

Privies is a term signifying the situation of those who are partakers, or have any interest in any action or thing, or who stand in a certain relation to another. Of *privies* there are five kinds:—1. Privies in blood; as the *heirs*, whether general or special, to the *ancestor*. 2. Privies in representation; as the *executor* to the *testator*, or the *administrator* to the *intestate*. 3. Privies in estates; as joint-tenants; the *donor* to the *donee;* the *lessor* to the *lessee*, &c. So formerly if a fine were levied, the *heirs* of him who levied it were privies. 4. Privies in contract; as when the lessee assigns all his interest. 5. Privies of estate and contract; as when the lessee assigns his interest, and the lessor has not accepted the assignee.—*F. N. B.* 117; 3 *Co.* 23, 123; 4 *Co.* 123; *Latch.* 260; 2 *Bl. Com.* 355; *Tidd's Practice*, 11, 12.

Prochein Amy, proximus amicus, is used in law for him who is the next friend, or next of kin to a child in his nonage, and is therefore allowed to interpose in favour of the infant in the management of his affairs.—1 *Bl. Com.* 464.

Protestando, in the law, is a certain form of pleading

where a defendant will not directly affirm nor deny any thing that is alleged by the plaintiff, or which he himself alleges; and it is likewise when a person is to answer to two matters, and by the law he ought to plead only to one; in which case, in the first part of his plea, he shall say, *protestando, that such a matter is not true,* and then add, *pro placito dicit,* for plea saith, &c. by which means he will not be concluded by his plea, but may take issue upon the other part of the matter which he has so saved by his protest.

Puis Darrein Continuance signifies a special plea, where some new matter is pleaded, pending an action, after the *last continuance;* as where a woman takes husband, an acquittance is given, or the plaintiff enters, &c., and this plea will be allowed at any time after issue, and before verdict.

Quantum Meruit is a certain action of the case, brought where one employs a person to do a piece of work for him, without making any agreement about the same; in this case it is by law implied, that he must pay for the work as much as shall be reasonably demanded; that is to say, *so much as the plaintiff hath deserved* (*a*).

Que Estate signifies *which estate,* and is a plea where one man entitling another to land, &c. says, that the same estate such other *had,* he *has* from him. Thus, in *quare impedit* the plaintiff may allege that two persons were seised of the lands to which the advowson was appendant in fee, and presented to the church,

(*a*) In case of goods sold, so much as the goods were worth, "*quantum valebant.*"

which afterwards became void; *which estate* of the said two persons he now has, and by virtue thereof presented, &c.—*Co. Lit.* 122; 1 *Co.* 46; 1 *Lev.* 190; 3 *Lev.* 19; *Lutw.* 81; 1 *Mod.* 232; 2 *Mod.* 144; 3 *Mod.* 52; *Cro. Jac.* 673.

Quoad hoc is often used in law pleadings and arguments to signify *as to the thing* named the law is so and so, &c.

Realty is the abstract of *real* as distinguished from *personalty*.

Recoupe signifies the keeping back or stopping something which is due, and in law it is used for *defalk* or *discount*. Thus, if a person hath a rent of ten pounds issuing out of certain lands, and he disseises the tenant of the land, if the disseisee recover the land and damages, the disseisor shall *recoupe* the rent in damages. —*Termes de la Ley; Dyer*, 2; 1 *Cro.* 196.

Respondeas Ouster signifies to answer over in an action to the merits of the cause, &c., as where on a dilatory plea, or there is a demurrer to the plea, and it is adjudged against the defendant, &c.

Scilicet, an adverb, signifying *that is to say, to wit*. It is not a direct and separate clause, nor a direct and entire clause, but *intermedia*: neither is it a substantive clause of itself, but is made use of to usher in the sentence of another, and to particularize that which was too general before, or to explain that which was doubtful and obscure. But it must neither increase nor

diminish, for it gives nothing of itself. It may, however, make a restriction where the precedent words are not so very express but that they may be restrained.—See *Lord Hobart's Reports*, 171, 172; *Poph.* 201, 204; *Cro. Jac.* 618.

Scire Facias is a judicial writ that lies in divers cases, but is most usually issued to call a person to show cause to the court whence it goes out, why execution of a judgment passed should not issue; as where a plaintiff has recovered debt or damages in a court of record, and does not take out execution within a year and a day after judgment recovered; in that case there must be a *scire facias* to revive the judgment, before the plaintiff shall have execution.

And where a plaintiff or defendant dies, execution may not be sued out on a judgment until the writ of *scire facias* is brought, and judgment given thereupon; so it is when judgment is recovered against a feme sole, who afterwards marries, the husband must be summoned to show cause why the execution should not be awarded against him.—*2 Lil.* tit. *Sci. Fa.*

On judgment being obtained against a testator, a *scire facias* issues against the executor, though within a year after the judgment had; for in these cases, where the person is altered, there is to be a new judgment to warrant the execution.

This writ might likewise be brought against bail, where the principal was not to be found, or did not surrender himself. There is a *scire facias* to hear errors, as also, upon a recognizance in chancery, to extend lands, &c.

Si Actionem is the Latin conclusion of a plea to the *action* brought; as where a defendant demands judgment, *if the plaintiff ought to have or maintain his action thereof*, &c.

Solvit ad diem is a plea to an action of debt upon a bond or penal bill, &c. whereby it is alleged that the money was paid at the day appointed.

Statutes of Jeofails are those that help divers defects in pleadings, after verdict given; for it is ordained, that judgment shall be had in any suit after an issue is tried, notwithstanding there may be any *Jeofail* or mispleading.

Tantamount is where one thing amounts to another, and then it is all one as if it were the same. Thus, a *lease and release* amount to a *feoffment.—Sheppard's Epitome*, 1130.

Testatum is a writ that lies where a defendant in an action cannot be arrested upon a *capias* in the county where the action is laid, and thereupon that writ is returned *non est inventus* by the sheriff, and it is so *testified*, in which case a *testatum* writ may be sent out into any other county where the defendant is supposed to be, or to have wherewith to satisfy.

Traverse is a word or term taken from the French, and, as used in the law, signifies to deny a thing alleged in a declaration or pleadings, &c. And a defendant's plea is deemed ill, wherein the plaintiff's title, &c. is neither traversed and denied, nor confessed and avoided,

but although each matter of fact pleaded by the plaintiff may be traversed, yet no matter of law may be so; nor may a record which is not to be tried by jury. The formal words of a traverse are, *without this, that*, in Latin, *absque hoc*, &c.

Variance signifies any alteration of a thing before laid in a plea, or where a declaration in a cause differs from the writ, or from the deed on which it is founded. —*2 Lilly*, 629; *Cro. Jac.* 479.

View is generally where a real action is brought, and the tenant does not certainly know what land it is the demandant requires; then he may pray the jury may *view* or see the land, &c. that is claimed: in which case a special writ of *distringas* issues, directed to the sheriff, commanding him to have six of the jury, or a greater number of them, at the place in question, some convenient time before the trial, who shall have the whole thing in dispute shown to them by two persons named in the said writ, and by the court appointed. For the present practice concerning views, as fully settled in *Hil. Term*, 30 *Geo.* 2, see *Bur. Rep.* 252, &c.

Venire facias is a judicial writ, whereby the sheriff is commanded to cause a jury to appear, upon a cause brought to issue, in order to try the same; and on which writ, if the jury do not appear at the day of the return of it, then a *habeas corpora* shall go out, and afterwards a *distress* until they do appear. The distringas is now for the sake of dispatch the first process.

Voire dire is a French term, used where there is an

interested witness, not otherwise to be excepted against, and it is prayed upon a trial at law, that the witness may speak the truth on oath, whether he shall be a gainer or loser by the matter in controversy; and if it appears he is unconcerned, his testimony is allowed, otherwise it is not.

Uncore Prist is the plea of a defendant who is sued for debt due on bond at a day past, wherein he says, that he tendered the money at the time and place, and that there was none there to receive it, and that he is still ready to pay the same; which plea saves the penalty of the obligation. And so in case of any other tender of payment.

EXPLANATION

OF

ABBREVIATIONS USED IN REFERENCES TO LAW-BOOKS, &c.

Abr. Ca. Eq.	Abridgment of Cases in Equity.
Act.	Acton's Reports.
Act. Reg.	Acta Regia.
Add. R.	Addam's Ecclesiastical Reports.
Ad. & E.	Adolphus and Ellis's Queen's Bench Reports.
Al.	Aleyn's Reports.
Amb.	Ambler's Reports.
Annaly.	Reports time Hardwicke.
And.	Anderson's Reports.
Andr.	Andrew's Reports.
Anst.	Anstruther's Reports.
Ass.	Assise (book of).
Ast. Ent.	Aston's Entries.
Atk.	Atkyn's Reports.
Ayl.	Ayliffe.
Bac. Abr.	Bacon's Abridgment.
B. & Ad.	Barnewall and Adolphus, Queen's Bench Reports.
B. & B. or Barn. & Ald...	Barnewall and Alderson's Reports.
B. & C.	Barnewall and Creswell's Queen's Bench Reports.
Banc. Sup.	Upper Bench.
Barn. C.	Barnardiston's Reports, Chancery.
Barn. K. B.	Barnardiston's Reports, King's Bench.
Barnes	Barnes's Notes, Common Pleas.
Beavan's Rep.	Beavan's Reports in Rolls Court.

Benl. Bendl.....	Benloe or Bendloe's Reports.
Bing. R.	Bingham's Common Pleas Reports.
Bl.	Blount.
W. Black	Sir Wm. Blackstone's Reports.
H. Black.....	Henry Blackstone's Reports.
Bla. Com.....	Blackstone's Commentaries.
Bligh, N. S.....	Bligh's Appeal Cases, *New Series*.
Bl. Ap. C.	Bligh's Appeal Cases.
Br. & B. R.	Broderip and Bingham's Common Pleas Reports.
B. N. C.	Bingham's "*New Cases*," Common Pleas.
B. & P. or Bos. & Pul. ..	Bosanquet and Puller's Reports.
Bra.	Brady or Bracton.
Bridg.	Bridgman's Rep. or Conv.
Br. Bro.	Brooke, Browne, Brownlow.
Bro. Ab.	Brooke's Abridgment.
Br. Brev. Jud. & Ent.....	Brownlow Brevia Judicial. &c.
Bro. Brow. Ent.	Brown's Entries.
Brown, P. C.	Brown's Parliament Cases.
Brown, C. C.	Brown's Chancery Reports.
B. N. C.	Brooke's New Cases.
Brownl. Rediv. or Ent. ..	Brownlow's Redivivus.
Brownl.	Brownlow and Gouldesborough's Reports.
Buck	Buck's Reports in Bankruptcy.
Bulst.	Bulstrode's Reports.
Bunb.	Bunbury's Reports.
Burr.	Burrow's Reports.
Burr. S. C.	Burrow's Settlement Cases.
C.	Codex (Juris Civilis.)
C. C.....	Cases in Chancery.
Cald.....	Caldecott's Reports.
Ca. temp. H.	Cases time Hardwicke.
Ca.	Case, or Placita.
Ca. T. K.....	Cases time King.
Cal.	Callis, Calthorpe.
Camp. N. P.	Campbell's Reports, Nisi Prius.
Cart.....	Carter's Reports.

Cary	Cary's Reports.
Carth.	Carthew's Reports.
Cas. T. Talb.	Cases time Talbot.
Cas. Pra. C. P.	Cases of Practice, Common Pleas.
Cas. B. R.	Cases *temp.* W. III. (12 Mod.)
Cas. L. Eq.	Cases in Law and Equity (10 Mod.)
Ca. P. or Parl.....	Cases in Parliament.
Cawl.	Cawley.
Chris. B. L.....	Christian's Bankrupt Laws.
Ch. Cas.	Cases in Chancery.
C. & P.	Carrington and Payne's Nisi Prius Reports.
Ch. Pre.....	Precedents in Chancery.
C. & J.....	Crompton and Jervis's Exchequer Reports.
Ch. R.	Reports in Chancery.
Ch. Rep.	Chitty's Reports, King's Bench.
Clay.	Clayton's Reports.
Cl. & Fin.....	Clark and Finnelly's Appeal Cases.
Clift	Clift's Entries.
Cockb. & R.....	Cockburn and Rowe's Election Cases.
Cod. or Cod. Jur.....	Codex by Gibson.
Co. Ent.	Coke's Entries.
Co. Lit.	Coke on Littleton (1 Inst.)
C. & M.	Crompton and Meeson's Exchequer Reports.
C., M. & R.....	Crompton, Meeson and Roscoe's Exchequer Reports.
Co. M. C.....	Coke's Magna Charta (2 Inst.)
Co. P. C.....	Coke's Pleas of the Crown (3 Inst.)
Co. on Courts	Coke's 4 Inst.
Comb.	Comberbach's Reports.
C. P.....	Common Pleas.
Com.	Comyn's Reports.
Com. Dig.....	Comyn's Digest.
Cont.	Contra.
Cooper	Cooper's Reports.
Co.	Coke's Reports.
Cooke, B. L.....	Cooke's Bankrupt Laws.

Cot.	Cotton.
Cow.	Cowper's Reports.
Cox	Cox's Reports.
Cr. Rep. Ins.	Creswell's Reports, Insolvent Debtors' Court
Cro. (1, 2, 3.)	Croke (Eliz. Jam. Cha.)
Cro. *sometimes refers to* Keilway's Reports, *published by Serj.* Croke.	
Cromp.	Crompton on Courts.
Cunn.	Cunningham's Reports.
Curt. Ecc. R.	Curteis's Ecclesiastical Reports.
D.	Dictum, Digest. (Juris Civilis).
Dal.	Dalison's Reports.
Dans. & Ll.	Danson and Lloyd's Commercial Reports.
D'An.	D'Anvers' Abridgment.
Dan.	Daniel's Reports.
Dav.	Davy's Reports.
Dea. & C.	Deacon and Chitty's Bankruptcy Reports.
Deac. B. C.	Deacon's Bankruptcy Reports.
Dick.	Dickins's Reports.
Dod.	Dodson's Reports in Admiralty.
D. P. C.	Dowling's Reports of Cases in King's Bench Practice Court.
D. & R.	Dowling and Ryland's Magistrates' Cases.
D. & R.	Dowling and Ryland's King's Bench Reports.
Dom. Proc.	Domini Proctor; Cases House of Lords.
Doug.	Douglas's Reports.
Dow	Dow's Reports in Parliament.
Dugd. Orig.	Dugdale's Origines.
Durnf.	Durnford and East, or Term Reports.
Di. Dy.	Dyer's Reports.
Dub.	Dubitatur.
E. T.	Easter Term.

East	East's Reports.
East, P. L.	East's Pleas of the Crown.
Eden	Eden's Reports.
Edw. A. R.	Edwards's Admiralty Reports.
Eq. Ca.....	Equity Cases Abridged.
Esp.	Espinasse's Reports or Digest, Nisi Prius.
Far.	Farresley (7 Mod. Rep.)
Ff.*	Pandectæ (Juris Civilis.)
Falc. & Fitz.....	Falconer and Fitzherbert's Election Cases.
Fin.	Finch's Reports.
F. or Fitz.†	Fitzherbert.
F. N. B.	Fitz. Nat. Brevium.
Fitz-G.	Fitz-Gibbon's Reports.
Fl.....	Fleta.
Fol.	Foley's Poor Laws.
Fonbl.	Fonblanque on Equity.
For.	Forrest's Reports.
For. Pla.	Brown's Formulæ.
Forrester	Cases time of Talbot.
Forts.	Fortescue's Reports.
Fost. Forst.	Foster's Reports.
Fra. M.....	Francis's Maxims.
Freem.	Freeman's Reports.
Gilb.	Gilbert's Cases in Law and Equity.
Godb.	Godbolt's Reports.
Godol.	Godolphin.
Golds.	Goldsborough's Reports.
Gro. de J. B.	Grotius de Jure Belli.
Hag. Ad.	Haggard's Admiralty Reports.
Hagg. Ecc. R.	Haggard's Ecclesiastical Reports.

* *This reference, which frequently occurs in* Blackstone *and other writers, applied to the* Pandects *or* Digests *of the civil law, and is a corruption of the Greek letter* π. *Vide* Calvini Lexicon Jurid. *voc.* Digestorum.

† Fitzherbert's Abridgment *is commonly referred to by the older law writers by the title and number of the placita only, e. g. Coron.* 30.

Hard.	Hardres's Reports.
Hawk. P. C.	Hawkins's Pleas of the Crown.
H. H. P. C.	Hales's Hist. Plac. Cor.
H. P. C.	Hales's Pleas of the Crown.
H. T.	Hilary Term.
Her.	Herne.
Het.	Hetley's Reports.
Hob.	Hobart's Reports.
Holt	Holt's Reports.
Hugh.	Hughes's Entries.
Hut.	Hutton's Reports.
Jac. R.	Jacob's Chancery Reports.
Jac. & W.	Jacob and Walker's Chancery Reports.
Jenk.	Jenkins's Reports.
1, 2, Inst.	(1, 2) Coke's Inst.
Inst. 1, 2, 3	Justinian's Inst. lib. 1, tit. 2, sec. 3.
Jon. 1, 2	Jones W. & T. Reports.
Keb.	Keble's Reports.
Keene, R.	Keene's Reports in Rolls' Court.
Kel.	Sir John Kelynge's Reports.
Kel. 1, 2	Wm. Kelynge's Rep. 2 Parts.
Knapp & Om.	Knapp and Ombler's Reports, Controverted Elections.
Kn. Pr. C. C.	Knapp's Privy Council Reports.
K. B.	King's Bench.
K. C. R.	Rep. *temp.* King C.
Keilw. Kel.	Keilwey's Reports.
Ken.	Kennet.
Kit.	Kitchin.
Lamb.	Lambard.
La.	Lane's Reports.
Lat.	Latch's Reports.
Leach	Leach's Crown Law.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Ley	Ley's Reports.
Lex Merc. Red.	Lex Mercatoria by Beawes.
Lib. Ass.	Liber Assisarum, Year Book, Part 5.
Lib. Reg.	Register Book.

Lib. Feud.	Liber Feudorum, usually printed at the end of the Corpus Juris Civilis.
Lib. Intr.	Old Book of Entries.
Lib. Pl.....	Liber Placitandi.
Lil. Abr.	Lilly's Practical Register.
Lil.	Lilly's Reports or Entries.
Ll. & Welsb. Com.....	Lloyd and Welsby's Commercial Reports.
Lit.	Littleton's Reports.
Lind.....	Lindwood.
Lit. with S.	Littleton, S. for section.
Lofft.....	Lofft's Reports.
Long Quinto.	Year-book, Part 10.
Lut.	Lutwyche's Reports.
M. & S. or Mau. & Sel...	Maule & Selwyn's Reports.
M. & W.	Meeson and Welsby's Exchequer Reports.
McLl. R.	McLeland's Exchequer Reports.
McLl. & Y. R.....	McLeland and Younge's Exchequer Reports.
Madd.	Maddock's Reports.
Mad.	Madox's Exchequer and Formulare.
Mal.	Malyne's Lex Mercatoria.
Man. & Ry.....	Manning and Ryland's K. B. Reports.
Man. & Ry. Mag. C.	Manning and Ryland's Magistrates' Cases.
Manw.	Manwood's Forest Laws.
Mar.....	March's Reports.
Marsh.....	Marshall's Reports.
Mer. or Meriv.	Merivale's Reports.
M. T.	Michaelmas Term.
Mo.	Moore's Reports.
Mod. Ca.	Modern Cases.
Mod. C. L. and Eq. 1, 2 ..	Modern Cases in Law and Equity, (8 & 9 Mod. Rep.)
Mod. Int. 1, 2	Modus Intrandi, 1, 2.
Mod. Rep.	Modern Reports.
Moll.....	Molloy's De Jure Maritimo.
Moore Rep.	Moore's Common Pleas Reports.

Moore & P.	Moore & Payne's Common Pleas Reports.
Moore & S.	Moore and Scott's Common Pleas Rep.
M. & M. N. P.	Moody and Malkin's Nisi Prius Reports.
Mood. & R. N. P.	Moody and Robinson's Nisi Prius Reports.
Mood. C. C.	Moody's Crown Cases Reserved.
Mont. & M'A. R.	Montagu and M'Arthur's Bankruptcy Reports
Montg. Rep.	Montagu's Bankruptcy Reports.
Mont. & Bl.	Montagu and Bligh's Bankruptcy Reports.
Mont. & Ayrt.	Montagu and Ayrton's Bankruptcy Rep.
Mont. & Ch.	Montagu and Chitty's Bankruptcy Reports.
Myl. & K.	Mylne and Keen's Chancery Reports.
Myl. & C.	Mylne and Craig's Chancery Reports.
N. R.	New Reports by Bosanquet and Puller.
N. Benl.	New Benloe.
N. & M.	Nevile and Manning's Q. B. Reports.
N. & M. Mag. C.	Nevile and Manning's Magistrates' Cases.
N. L.	Nelson's Lutwyche
Nev. & P.	Nevile and Perry's Q. B. Reports.
Nev. & P.	Nevile and Perry's Magistrates' Cases.
New T. R.	New Term Reports.
North.	Northington's Reports.
N. Nov.	Novellæ (Juris Civilis).
No. N.	Novæ Narrationes.
O. Benl.	Old Benloe.
Off. Br.	Officina Brevium.
Ow.	Owen's Reports.
P. C.	Pleas of the Crown.
P. W.	Peere Williams's Reports.
Pal.	Palmer's Reports.
Par.	Parker's Reports.
Pea.	Peake's Reports, N. P.
Pl. Pla. P. p.	Placita.
Per. & Dav.	Perry and Davison's Q.B. Reports.
Per. & Dav. Mag. C.	Perry and Davison's Magistrates' Cases.

Per. & Kn. Elec. Cas.....	Perry and Knapp's Controverted Election Cases.
Philim.....	Phillimore's Reports.
Pl. Com.	Plowden's Com. or Reports.
Pol.	Pollexfen's Reports.
Poph.	Popham's Reports.
2 Poph.	Cases at the end of Popham's Reports.
P. R. C. P.	Practical Register in Common Pleas.
Pr. Reg. Ch.	Practical Register in Chancery.
Pr. Ch.....	Precedents in Chancery.
Price or Pr.	Price's Reports.
Priv. Lond.	Privilegia Londini.
Pr. St.	Private Statute.
Quinti Quinto.(*a*)	Year-book, 5 Hen. V.
Q. War.	Quo Warranto.
R. & M. C. C.....	Ryan and Moody's Crown Cases Reserved.
R. & M. N. P.	Ryan and Moody's Nisi Prius Reports.
Rast.	Rastell's Entries and Statutes.
Ld. Raym.	Lord Raymond's Reports.
Raym. T.	Sir Thomas Raymond's Reports.
Raym.	Raymond.
Reg. Brev.	Register of Writs.
Reg. Pl.	Regula Placitandi.
Reg. Jud.....	Registrum Judicale.
Rep. (1, 2, &c.)	1, 2, Coke's Reports, &c.
Rep. Eq.	Gilbert's Reports in Equity.
Rep. Q. A.	Reports *temp.* Queen Anne.
Rep. temp. Finch.	Finch's Reports.
Rob.....	Robinson's Entries.
Rob. A.	Robinson's Reports Admiralty, or Robertson's Reports of Appeals.
Rob. Sc. Ap.	Robertson's Scotch Appeal Cases.
R. S. L.	Reading Statute Law.
Rose.	Rose's Reports.
Roll. and Roll. Abr.	Rolle, Reports and Abridgment.

(*a*) Vide 5 *Hen.* 7, 19, 24.

Roll.	Roll of the Term.
Rush.	Rushworth's Collections.
Russ. Ch. R.	Russell's Chancery Reports.
Russ. & M.....	Russell and Mylne's Chancery Reports.
Russ. & Ry. C. C.....	Russell and Ryan's Crown Cases Reserved.
Ry. F.	Rymer's Fœdera.
S. §.....	Section.
Salk.....	Salkeld's Reports.
Sav.	Savile's Reports.
Saund.	Saunders's Reports.
Sch. & Lef.	Schoales and Lefroy's Reports.
Scott, C. P.	Scott's Common Pleas Reports.
Seld.....	Selden.
Sel. Ca.	Select Cases.
Sem.	Semble, seems.
Sess. Ca.	Sessions Cases.
Sh. Sc. Ap.	Shaw's Scotch Appeal Cases.
Sh. & M'Lean.....	Shaw and M'Lean's Appeal Cases.
Show.	Shower's Reports.
Shower's P. C.....	Shower's Parliament Cases.
Sid.	Siderfin's Reports.
Sim. R.	Simon's Reports in Vice-Chancellor's Court.
Sim. & St.	Simon and Stuart's Reports in Vice-Chancellor's Court.
Skin.....	Skinner's Reports.
Smith.	Smith's Reports.
Som.	Somer, Somers.
Spel.....	Spelman.
S. C. C.	Select Chancery Cases.
Stark. N. P.....	Starkie's Reports.
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T. R.	Term Reports.

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Wms.	Williams's Reports, or Peere Williams.
Y. B.(*b*)	Year Books.
Y. & Jer.	Younge and Jervis's Exchequer Reports.
Yelv.....	Yelverton's Reports.
Youn. & Col.	Younge and Collyer's Equity Reports.
Younge Exch.	Younge's Exchequer *Equity* Reports.

(*a*) *This abbreviation is frequently used in* Domesday-book, *and in the more ancient law writers. See* Tyrrel's Hist. Eng. Introd. v. iii. 49. *See also* Cowel's Dict. *verb.* Reveland, *where notice is taken of a wrong inference of* Lord Coke's, 1 Inst. 86, *from a quotation of* Domesday book, *where this abbreviation is interpreted* Terra Regis Edwardi.

(*b*) *The Year-Books are usually referred to by the Year of each King's reign, the initial letter of his Name, and the page and number of the placita; to which is sometimes prefixed the initial letter of the term,* e. g. *M.* 4 *H.* 7, 18, 10.

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The old way of quoting was much more troublesome, by only mentioning the Number, or initial Words, of the Paragraph or Law, without expressing the number either of book or Title. Thus § *si adversus* 12 *Inst. de Nuptiis*, means the 12th Paragraph of the Title in the Institutions *de Nuptiis*, which paragraph begins with the words *si adversus;* and which a modern civilian would cite thus, I. 1, 10, 12. So, *l.* 30 *D. de R. J.* signifies the 30th Law of the Title in the Digests *de Regulis Juris;* according to the modern way, thus, D. 50, 17, 30. Again, *l.* 5, §. 3. *ff. de Jurejur.* means the 3rd Paragraph of the 5th Law of the Title in the Digests *de Jurejurando;* better thus, D. 12, 2, 5, 3. And here note, that the Digests are sometimes referred to, as in the last instance, by a double *f;* and at other times by the Greek Π or π.

INDEX.

C.

D.

E.

K.

L.

M.

N.

O.

P.

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